138-226

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. ~~1585~~. 1096

BENJAMIN SEEGER AND THE CITY OF ST. LOUIS, PLAINTIFFS IN ERROR,

vs.

EDWARD RUTZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

FILED JANUARY 6, 1890.

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1 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of the United States for the southern district of Illinois, before you, between Edward Rutz, plaintiff, and Benjamin Seeger and The City of St. Louis (Missouri), defendants, a manifest error has happened, to the great damage of the said defendants, Benjamin Seeger and The City of St. Louis, as by their complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the
2 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 4th day of November, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth year.

JAMES T. JONES,
Clerk of Circuit Court of the United States for the Southern District of Illinois.

[Endorsed:] Filed November 4, A. D. 1889. James T. Jones, clerk of U. S. circuit court, south'n dist. of Ills.

3 *Placita.*

Pleas in the circuit court of the United States of America within and for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. William J. Allen, judge of the district court and, in the absence of the Hon. Walter Q. Gresham, judge of the seventh judicial circuit *pro tempore*, sole judge of said circuit court, on Monday, the 1st day of April, in the year of our

Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and thirteenth year.

JAMES T. JONES, *Clerk.*

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } No. 6878. Ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

4 Be it remembered that heretofore, to wit, on the 31st day of May, in the year of our Lord one thousand eight hundred and eighty-four, came the defendants in the foregoing-entitled cause, by Messrs. Leverett Bell and William C. Kueffner, their attorneys, and filed in the office of the clerk of said court a transcript of the record in said cause from the circuit court of St. Clair county, Illinois; and afterwards, to wit, on the 5th day of January, in the year of our Lord one thousand eight hundred and eighty-five, came again the said defendants, by their said attorneys, and filed in said clerk's office another and fuller transcript of the record in said cause from the circuit court of St. Clair county, Illinois; which said last-mentioned transcript embraces all the *the* records and proceedings contained in the transcript filed May 31st, A. D. 1884, and is in the words and figures following, to wit:

5 *Transcript of Record from St. Clair County Circuit Court.*

STATE OF ILLINOIS, } *ss:*
St. Clair County, }

At a regular term of the circuit court within and for the county of St. Clair and State of Illinois, begun and held at the court-house, in the city of Belleville, in said county of St. Clair, on Monday, the 15th day of September, A. D. 1884, it being the third Monday of September, A. D. 1884, according to the act of the General Assembly, by the Hon. William H. Snyder, one of the judges of the third judicial circuit of the State of Illinois, of which the said county of St. Clair forms a part, the following proceedings were had, to wit:

Present: Honorable William H. Snyder, judge; Frederick Ropiequet, sheriff; Robert D. W. Holder, State's attorney; Geo. H. Stolberg, clerk.

Be it remembered that on the 29th day of January, 1884,
6 the following summons was issued, to wit:

1. *Summons.*

STATE OF ILLINOIS, } *ss:*
St. Clair County, }

The People of the State of Illinois to the sheriff of St. Clair county, Greeting:

We command you to summon Benjamin Seeger, if he can be found in your county, to be and appear in the St. Clair county circuit court on the first day of the next term thereof, to be holden at

the court-house, in the city of Belleville, in the said county of St. Clair, on the third Monday of February, 1884, then and there to answer unto Edward Rutz in an action of ejectment, to the plaintiff's damage, as he says, of the sum of ten thousand dollars, and not to fail under penalty of what the law directs; and this writ you shall have at our said court, with your return endorsed thereon.

Witness Geo. H. Stolberg, clerk of the circuit court, and the seal thereof hereunto affixed, at office, this 29th day of January, [SEAL.] A. D. one thousand eight hundred and eighty-four.

GEO. H. STOLBERG, *Clerk*,
By GEO. W. SCHUESSLER, *Dep'ty*.

7 STATE OF ILLINOIS, } ss:
St. Clair County, }

I have duly served the within summons, by reading the same to the within-named Benjamin Seeger, this 31st day of January, A. D. 1884.

FRED. ROPIEQUET, *Sh'ff*,
By D. D. ANTHONY, *Dep'ty*.

Filed Feb. 9, 1884.

Be it remembered that on the 29th day of January, 1884, the following declaration was filed:

2. *Declaration.*

STATE OF ILLINOIS, } ss:
St. Clair County, }

In Circuit Court of said County. February Term, A. D. 1884.

Edward Rutz, the plaintiff, complains of Benjamin Seeger in a plea of ejectment, for that *defendant* on the first day of January, A. D. 1884, was lawfully possessed of a certain parcel of land situated in the county of St. Clair and State of Illinois, viz: Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine in the common fields of Prairie Du Pont, from which the south-
8 ernmost corner of said survey number one hundred and forty-eight at the bluffs bears S. 33½° E. (var. 6°) two hundred and forty-nine & $\frac{25}{100}$ (249.25) chains, thence north 33½° W. with said line of said surveys extended to the centre thread of the Mississippi river; thence down along the centre thread of said river to the line between surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) extended to said centre thread of said river, making the right-angle distance between the said extended lines 34.60 chains; thence south 33½° E. along said last-mentioned extended line to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-six (156) bears south 33½° east two hundred and fifty-four chains distant; thence along the meanders of the

original bank of the Mississippi river, as surveyed by the United States Government in surveying said common fields, to the point of beginning, with the appurtenances, which lands and tenements plaintiff claims in fee; and the plaintiff being so possessed thereof, the defendant afterwards, to wit, on the second day of January, A. D. 1884, entered into said lands and tenements and now unlawfully withholds possession thereof from the plaintiff, to the damage of the plaintiff in the sum of $10,000; wherefore he brings suit.

And for that also the said plaintiff was, on the 1st day of January, A. D. 1884, possessed of a certain parcel of land situate in the county of St. Clair and State of Illinois, to wit: Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine (149) of the common fields of Prairie Du Pont, from which the southermost of said survey one hundred and forty-eight, at the bluffs, bears south 33½° east 249.25 chains distant, thence at right angles with the centre thread of the Mississippi river in a southwestern course to the centre thread of said river; thence down said center thread of said river in the southwestern course to a point where a line run at right angles with the centre thread of said river will strike a point on the line between surveys number one hundred and fifty-six (156) and one hundred and fifty-seven 157) of said common fields, from which the southernmost corner of said survey one hundred and fifty-six (156) bears south 33½° east two hundred and fifty-four chains distant; thence northeasterly with the meanders of the bank of the Mississippi river, as surveyed by the United States Government in making the survey of said common fields, to the point of beginning, with the appurtenances, which said lands and tenements plaintiff — in fee; and the plaintiff being so possessed thereof, the defendant afterwards, to wit, on the 2d day of January, A. D. 1884, entered into said lands and tenements and now unlawfully withholds possession thereof from the plaintiff, to plaintiff's damage, $10,000; wherefore he brings suit.

And for that also the plaintiff, on the first day of January, A. D. 1884, was possessed of a certain parcel of land situated in the county of St. Clair and State of Illinois, viz.: Commencing the survey thereof at a point in the line of survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157) in the common fields of Prairie Du Pont, from which the most southern corner of said survey one hundred and fifty-six (156) bears S. 33½° E. two hundred and fifty-four chains distant, thence in a northeastern course along the meanders of the Mississippi river as surveyed by the United States Government to a point in the line of surveys number one hundred and forty-eight (148) and one hundred and forty-nine (149) in said common fields, from which the southernmost corner of said survey one hundred and forty-eight (148) at the bluffs bears S. 33½° E. 249.25 chains; thence on a line at right angles with the said meanders line where it bisects said point to the center thread of the Mississippi river; thence down and along said center thread to a point thereon where a line drawn

at right angles with the said meander line where it bisects the point of beginning strikes said centre thread; thence along
12 said line so drawn to the point of beginning, with the appurtenances, which lands and tenements plaintiff claims in fee; and plaintiff being so possessed thereof, the defendant afterwards, on, to wit, the 2d day of January, A. D. 1884, entered into said lands and tenements and now unlawfully withholds possession thereof from the plaintiff, to plaintiff's damage $10,000; wherefore he brings suit.

R. A. HALBERT,
Pl'ff's Att'y.

Be it remembered that on the 20th day of February, 1884, the following plea of general issue was filed:

3. *Plea of Ben. Seeger.*

STATE OF ILLINOIS, } ss:
County of St. Clair, }

In the Circuit Court. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

And the defendant, by Leverett Bell and William C. Kueffner, his attorneys, comes and defends the wrong and injury when, etc., and says that he is not guilty of unlawfully withholding the
13 tenements in the said declaration mentioned or any part thereof in manner and form as the plaintiff has above thereof complained against him; and of this the defendant puts himself upon the country.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
His Attorneys.

Be it remembered that on the 17th day of March, 1884, the following plea of general issue of the city of St. Louis was filed:

4. *Plea of City of St. Louis.*

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

And The City of St. Louis, made defendant herein as the landlord of said Benjamin Seeger for all the premises involved in this suit, as such landlord comes and defends the wrong and injury when, etc., and says that neither it, said city of St. Louis, nor said Benjamin Seeger is guilty of unlawfully withholding the tenements

in said declaration mentioned or any part thereof in manner
14 and form as the plaintiff has above thereof complained; and of this it puts itself upon the country.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Attorneys for the City of St. Louis.

Be it remembered that on the 19th day of March, 1884, the following amended plea of the city of St. Louis was filed:

5. *Amended Plea of City of St. Louis.*

In the Circuit Court of St. Clair County, Illinois. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

And the city of St. Louis, defending herein in its own behalf, as well as for said Benjamin Seeger, comes and defends the wrong and injury when, etc., and says that neither it, said city of St. Louis, nor said Benjamin Seeger is guilty of unlawfully withholding the tenements in the said declaration mentioned or any part thereof in manner and form as the plaintiff has above thereof complained; and of this it puts itself upon the country.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Its Attorneys.

15 Be it remembered that at the February term, 1884, of this court the following proceedings were had:

6. *Proceedings of Court, Feb'y Term*, 1884.

In the Circuit Court of St. Clair County, Illinois. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

On the fourth Friday of the term, being the 14th day of March' 1884, comes the city of St. Louis, a municipal corporation under the laws of the State of Missouri, and moves the court to be made defendant herein as the landlord of said Benjamin Seeger, and that it may be substituted herein as defendant in the place of said Seeger, and that it may be permitted as such landlord to control and direct the defence of this suit.

And it appearing to the court that said city of St. Louis is a municipal corporation under the laws of the State of Missouri, and that it is the landlord of said Seeger for all the premises involved in this suit, it is thereupon ordered by this court that said City of
16 St. Louis be made codefendant in this suit as the landlord of said Seeger, buts its motion to be substituted as the sole de-

fendant in place of said Seeger is denied, and leave is given said city to plead by the 5th Wednesday of the term.

On the 5th Monday of the term, being the 17th day of March, 1884, it is ordered by the court, with the consent of said defendants, that said city of St. Louis have the sole control and direction of the defence of this suit as the landlord of said Seeger.

On the 5th Wednesday of the term, being the 19th day of March, 1884, leave is given said city of St. Louis to file an amended plea; and on the 6th Thursday of the term, being the 27th day of March, 1884, the said city of St. Louis and said Benjamin Seeger file and present their petition to the court, with a removal bond, praying that this cause may be removed to the circuit court of the United States for the southern district of Illinois; and said plaintiff having filed his answer to said petition, in part denying it, it is or-
17 dered by the court that evidence be heard as to the truth of the allegations in the petition contained, and the court declines to take action on said petition until such evidence is heard; and leave is given the defendants or either of them to file a bill of exceptions until April 15th, 1884.

Be it remembered that at the May term, 1884, the following proceedings were had, to wit:

7. *Proceedings of Court, May Term*, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and CITY OF ST. LOUIS. } Ejectment.

On the 20th day of May, 1884, it is ordered by the court that the petition for removal of this cause to the United States circuit court in and for the southern district of Illinois be passed on by the Hon. William H. Snyder, one of the judges of the third judicial circuit of the State of Illinois.

Be it remembered that at the September term, 1884, of this
18 court the following proceedings were had:

8. *Proceedings of Court at Sept. Term*, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

On the 29th day of December, 1884, the petition of Benjamin Seeger and the city of St. Louis for a removal of this cause to the circuit court of the United States for the southern district of Illinois having been heard by the court and the court being duly advised in the premises, thereupon the court denies said petition, and leave is given said Seeger and said city of St. Louis to file a bill of exceptions within twenty days from this date.

Be it remembered that on the 27th day of March, 1884, the following petition of the city of St. Louis and Benjamin Seeger for re-

moval of cause to the circuit court of the United States for the southern district of Illinois was filed:

9. *Petition for Removal to U. S. Court.*

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

Petition for the removal to the circuit court of the United States for the southern district of Illinois.

To the said circuit court of St. Clair county:

The petition of the said city of St. Louis, a municipal corporation under the laws of the State of Missouri, of the State of Missouri, heretofore made a codefendant in said suit, and of said Benjamin Seeger shows to this court as follows:

That the said petitioners are the defendants in the above-mentioned suit, the said City of St. Louis having been made codefendant, as the landlord of said Seeger, for all the premises involved in said suit; that said city is such landlord, and that, as such landlord, said city of St. Louis is entitled to manage and control the whole defence in this suit, and does so manage and control it, and that it claims to be the owner in fee of the premises involved in this suit, subject only to the tenant right of said Seeger; that said Seeger has filed a disclaimer of any interest in said premises, except as
20 tenant, and has stipulated of record that the petitioner, The City of St. Louis, shall have the management and control of the whole defence in said suit as landlord.

And that said suit was commenced in this court by said Rutz against said Seeger, and the declaration therein was filed on the 29th day of January, 1884, and summons was issued therein on said day, returnable to the present term of this court, and said writ was served on said Seeger on the 31st day of January, 1884; that said city of St. Louis has filed the plea of general issue to said declaration, and said cause is now pending; that said cause has not been tried, and that this is the first term of court at which it could have been tried.

Your petitioners further show that there is a controversy in said suit between said city of St. Louis and said Edward Rutz relating to the title to the property involved in said suit; that said controversy is between citizens of different States, and that said city of St. Louis was at the time of the commencement of this suit and ever since has been and still is a citizen of the State of Missouri,
21 and that said Edward Rutz was at the time of the commencement of this suit and ever since has been and still is a citizen of the State of Illinois, and that your petitioner, Benjamin Seeger, although occupying premises in the State of Illinois, was at the time of the commencement of this suit and ever since has been and still is a citizen of the State of Missouri, and that the whole controversy in the said suit above mentioned is wholly between citizens

of different States and can be wholly and fully determined between them—that is to say, said controversy is wholly between the said city of St. Louis and said Edward Rutz, said city of St. Louis defending as the landlord of said Seeger herein and having the whole management and control of the defence in said suit; that said controversy relates to the title to the property involved in said suit, and that the matter and amount and the value of the property so in dispute and controversy between said city of St. Louis and said Edward Rutz in this suit and for which this suit is brought
22 exceeds, exclusive of costs, the sum and value of five hundred dollars.

And your petitioners offer herewith a bond with good and sufficient security for the petitioners entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto.

And the petitioners pray this honorable court to proceed no further herein except to make the order of removal required by law and to accept said security and bond and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Illinois, and they will ever pray.

[SEAL.]

BEN. SEEGER,
THE CITY OF ST. LOUIS,
WM. L. EWING, *Mayor*,
LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Attorneys for Benjamin Seeger and City of St. Louis.

Attest with seal of city.
NICHOLAS BERG, *Register.*

23 Be it remembered that on the 27th day of March, 1884, the following bond of Benjamin Seeger and the city of St. Louis for removal of cause was filed:

10. *Bond for Removal to U. S. Court.*

Know all men by these presents that Benjamin Seeger, of the city of St. Louis, Missouri, and The City of St. Louis, a municipal corporation under the laws of the State of Missouri, of the State of Missouri, as principals, and William C. Kueffner, of the city of Belleville, in the county of St. Clair and State of Illinois, surety, are held and firmly bound unto Edward Rutz, of the State of Illinois, in the penal sum of five hundred dollars; for the payment of which, well and truly to be made to said Edward Rutz, his heirs and assigns, we bind ourselves, our heirs, legal representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Benjamin Seeger and the said city of St. Louis having petitioned the circuit court of St. Clair

county, Illinois, for the removal of a certain cause therein pending, wherein said Edward Rutz is plaintiff and Benjamin Seeger
24 and said City of St. Louis are defendants, to the circuit court of the United States in and for the southern district of Illinois:

Now, if the said Benjamin Seeger and said city of St. Louis shall enter into the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if said court shall hold that said suit was wrongfully removed thereto, then this obligation to be void; otherwise to be in full force and virtue.

In testimony whereof said city of St. Louis has executed these presents and affixed its common seal hereto, and said Benjamin Seeger and William C. Kueffner have hereunto set their hands and seals, this 24th day of March, 1884.

BEN. SEEGER. [SEAL.]
THE CITY OF ST. LOUIS, [SEAL.]
By WM. L. EWING, *Mayor.*
WILLIAM C. KUEFFNER. [SEAL.]

[SEAL.] Attest with the seal of the city.
NICHOLAS BERG, *Register.*

25 Be it remembered that on the 27th day of March, 1884, the following answer to petition for removal of this cause was filed:

11. *Answer to Petition for Removal.*

STATE OF ILLINOIS, } *ss:*
St. Clair County, }

Of the February Term, A. D. 1884, of the Circuit Court of said County.

EDWARD RUTZ
vs.
BENJAMIN SEEGER *et al.* } Ejectment.

Answer to petition for change of venue.

And the said Edward Rutz, plaintiff in said suit, denies that the controversy in this suit is solely between citizens of different States, but says the controversy involves the possession as well as the title to the real estate in controversy; says that the person in possession of the premises and against which said suit is brought to recover the possession thereof, Benjamin Seeger, is a citizen of the State of Illinois; and the said Rutz further denies that the city of St. Louis is a citizen within the intent and meaning of the statutes of the United States, or that it can have or hold title to real
26 estate situate in the State of Illinois or be the landlord of any one.

EDWARD RUTZ,
By R. A. HALBERT,
His Attorney.

Be it remembered that on the 14th day of April, 1884, the following bill of exceptions was filed:

12. *Bill of Exceptions.*

In the Circuit Court of St. Clair County, Illinois. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

Be it remembered that during the progress of this cause the following proceedings were had:

On the fourth Friday of the term, being the 14th day of April, 1884, the city of St. Louis, a municipal corporation under the laws of the State of Missouri, presents to the court the following motion:

STATE OF ILLINOIS,
County of St. Clair, } *ss:*

In the Circuit Court. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

27 Now comes the city of St. Louis, a municipal corporation under the laws of the State of Missouri, in the State of Missouri, by Leverett Bell and William C. Kueffner, its attorneys, and represents and shows to the court here that said city of St. Louis is the landlord of said defendant, Benjamin Seeger, for all the premises and real estate involved in this suit, and that it is the owner in fee simple of all of said real estate; wherefore said city of St. Louis prays to be made defendant in this suit and to be substituted therein in the place of said Seeger as a defendant, and that it may be permitted to control and direct the defence of this suit, and the said city offers to submit to such terms as may be imposed by the court and may be according to law.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Its Attorneys.

And in support of said motion it presented and read to the court the following stipulation:

1. A stipulation of said Edward Rutz, Benjamin Seeger,
28 and said city of St. Louis in words as follows:

STATE OF ILLINOIS, }
County of St. Clair, } *ss:*

In the Circuit Court. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

It is hereby agreed between the parties that the city of St. Louis, a municipal corporation under the laws of the State of Missouri, in the State of Missouri, is the landlord of said Seeger for all the premises and real estate involved in this suit.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Attorneys for Benjamin Seeger.
R. A. HALBERT, *Att'y for Pl'ff.*
THE CITY OF ST. LOUIS, MO.,
By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Its Attorneys.

2. A stipulation of said Benjamin Steeger in words as follows:

In the Circuit Court of St. Clair County, Illinois. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

29 Now comes the said Benjamin Seeger and disclaims all interest in the premises involved in this suit, except his mere possessory right therein as tenant of the city of St. Louis, a municipal corporation under the laws of the State of Missouri, and he admits that the said city of St. Louis is the owner in fee simple of said premises and has the whole title thereof, subject only to said tenant right, and he consents that said city of St. Louis may be made defendant in this suit, and that it may have complete control of the defence therein and manage the same without any conditions being imposed upon it, and he waives all right to be indemnified against costs herein, and he consents that said city of St. Louis may be substituted as the sole defendant herein, and, if final judgment go herein in favor of the plaintiff, that the plaintiff may have such further process and remedy against him, the said Seeger, as if he had remained defendant in this suit, and that he, the said
30 Seeger, shall be deemed to remain in court for that purpose, and also for the further purpose of any suggestion of damages for mense profits that may be made by the plaintiff.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
His Attorneys.

3. A stipulation of said city of St. Louis in words as follows:

In the Circuit Court of St. Clair County, Illinois. February Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER. } Ejectment.

Now comes the city of St. Louis, a municipal corporation under the laws of the State of Missouri, and stipulates that it will admit, if made defendant in this suit, and that it shall stand admitted on the trial of this suit, that it, the said city of St. Louis, was in possession of all the premises and real estate involved in this suit at the time this suit was commenced, and that it is still in such possession.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Its Attorneys.

31 Which motion having been heard and considered by the court, the court ordered that the said city of St. Louis be made a codefendant in this suit, but denied the motion of said city to be substituted as defendant in place of said Seeger; to which action of the court in refusing to substitute said city as a defendant in place of said Seeger the said city of St. Louis then and there excepted.

And afterwards, on the sixth Thursday of the term, being the 27th day of March, 1884, the said city of St. Louis and Benjamin Seeger presented to the court their petition for the removal of this cause to the circuit court of the United States for the southern district of Illinois, together with a removal bond, it being then and there admitted by the parties that the said city of St. Louis is a municipal corporation under the laws of the State of Missouri, and that the surety on said bond is sufficient; which petition and bond are in words as follows:

In the Circuit Court of St. Clair County, Illinois. February Term, 1884.

32 EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

Petition for Removal to the Circuit Court of the United States for the Southern District of Illinois.

To the circuit court of said St. Clair county:

The petition of the city of St. Louis, a municipal corporation under the laws of the State of Missouri, of the State of Missouri, heretofore made a codefendant in said suit, and said Benjamin Seeger shows to this court as follows:

That said petitioners are the defendants in the above-mentioned suit, said city of St. Louis having been made codefendant, as the landlord of said Seeger for all the premises involved in said suit, and that said city is such landlord, and that as such landlord said city of St. Louis is entitled to manage and control the whole defence in this suit, and does so manage and control it, and that it claims to be the owner in fee of the premises involved in this suit, subject only to the tenant right of said Seeger.

33 That said Seeger has filed a disclaimer of any interest in said premises except as tenant, and has stipulated of record that the petitioner, the city of St. Louis, shall have the management and control of the whole defence in said suit as landlord, and that said suit was commenced in this court by said Rutz against said Seeger, and the declaration therein was filed on the 29th day of January, 1884, and summons was issued therein on said day, returnable to the present term of this court, and said writ was served on said Seeger on the3 1st day of January, 1884.

That said city of St. Louis has filed the plea of general issue to said declaration, and said cause is now pending; that said cause has not been tried, and that this is the first term of court at which it could have been tried. Your petitioners further show that there is a controversy in said suit between said city of St. Louis and said Edward Rutz, relating to the title to the property involved in said suit, that said controversy is between citizens of different

34 States; and that said city of St. Louis was at the time of the commencement of this suit and ever since has been and still is a citizen of the State of Missouri.

And said Edward Rutz was at the time of the commencement of this suit and ever since has been and still is a citizen of the State of Illinois, and that your petitioner, Benjamin Seeger, although occupying premises in the State of Illinois, was at the time of the commencementof this suit and ever since has been and still is a citizen of the State of Missouri, and that the whole controversy in the said suit above mentioned is wholly between citizens of different States and can be wholly and fully determined between them—that is to say, said controversy is wholly between said city of St. Louis and said Edward Rutz, said city of St. Louis defending as the landlord of said Seeger herein and having the whole management and control of the defence in said suit; that said controversy relates to the title to the property involved in said suit, and that the matter and amount and the value of the property so in dispute and

35 controversy between said city of St. Louis and said Edward Rutz in this suit and for which this suit is brought exceeds, exclusive of costs, the sum and value of five hundred dollars.

And your petitioners offer herewith a bond, with good and sufficient security, for the petitioners entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if said court shall hold that this was wrongfully or improperly removed thereto.

And petitioners pray this honorable court to proceed no further

herein except to make the order of removal required by law and to accept said security and bond and to cause the record herein to be removed into said circuit court of the United States in and for the southern district of Illinois, and they will ever pray.

BEN SEEGER.
THE CITY OF ST. LOUIS,
By WM. L. EWING, *Mayor.*
LEVERETT BELL AND
WILLIAM C. KUEFFNER,
[SEAL.] *Attorney- for Benjamin Seeger and City of St. Louis.*

Attest with seal of city.
NICHOLAS BERG, *Register.*

36 Know all men by these presents that Benjamin Seeger, of the city of St. Louis, Missouri, and that the city of St. Louis, a municipal corporation under the laws of the State of Missouri, of the State of Missouri, as principal, and William C. Kueffner, of the city of Belleville, in the county of St. Clair and State of Illinois, as surety, are held and firmly bound unto Edward Rutz, of the State of Illinois, in the penal sum of five hundred dollars; for the payment of which, well and truly to be made to said Edward Rutz, his heirs and assigns, we bind ourselves, our heirs, legal representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Benjamin Seeger and said city of St. Louis having petitioned the circuit court of St. Clair county, Illinois, for the removal of a certain cause therein pending, wherein said Edward Rutz is plaintiff and Benjamin Seeger and said City of St. Louis are defendants, to the circuit court of the United States in and for the southern district of Illinois:

37 Now, if the said Benjamin Seeger and the city of St. Louis shall enter into the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully removed thereto, then this obligation to be void; otherwise to be in full force and virtue.

In testimony whereof said city of St. Louis has executed these presents and affixed its common seal hereto and said Benjamin Seeger and William C. Kueffner have hereunto set their hands and seals this 24th day of March, 1884.

BEN. SEEGER. [SEAL.]
THE CITY OF ST. LOUIS, [SEAL.]
By WM. L. EWING, *Mayor.*
WILLIAM C. KUEFFNER. [SEAL.]

Attest with the seal of the city.
[SEAL.] NICHOLAS BERG, *Register.*

38 And the said plaintiff having filed his answer to said petition denying the same in part, which answer is as follows:

STATE OF ILLINOIS, } ss:
St. Clair County, }

Of the Feb. Term, A. D. 1884, of the Circuit Court of said County.

EDWARD RUTZ
vs.
BENJAMIN SEEGER *et al.* } Ejectment.

Answer to Petition for Change of Venue.

And the said Edward Rutz, plaintiff in said suit, denies that the controversy in this suit is solely between citizens of different States, but says the controversy involves the possession as well as the title to the real estate in controversy; alleges that the person in possession of the premises against which said suit is brought to recover the possession thereof, Benjamin Seeger, is a citizen of the State of Illinois; and the said Rutz further denies that the said city of St. Louis is a citizen within the intent and meaning of the statutes of the United States, or that it can have or hold title to real estate situate in the State of Illinois or be the landlord of any one.

EDWARD RUTZ,
By R. A. HALBERT,
His Attorney.

39 It was thereupon further ordered by the court that evidence be heard as to the truth of said petition, and the court declined to take action on said petition until such evidence should be heard; to which action of the court in ordering that evidence be heard as to the truth of said petition and declining to take action on said petition until such evidence could be heard the said defendants and each of them then and there excepted; and whereas the matters aforesaid do not fully appear of record, the said city of St. Louis and Benjamin Seeger present this their bill of exceptions and pray that the same may be signed and sealed by the court and made a part of the record, which is done this 27th day of March, 1884.

WILLIAM H. SNYDER, *Judge.* [SEAL.]

Be it remembered that on the 2d day of January, 1885, the following bill of exceptions was filed:

40 13. *Bill of Exceptions.*

In the Circuit Court of St. Clair County, Illinois. September Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

Bill of exceptions.

Be it remembered that at the hearing of the petition of said Benjamin Seeger and the city of St. Louis for a removal of this cause

to the circuit court of the United States for the southern district of Illinois the following proceedings were had:

The said petitioner Seeger and the city of St. Louis, to maintain the issues on their behalf, read in evidence the deposition of said defendant and petitioner SEEGER as follows:

Q. How old are you?
Ans. Sixty-one years old.
Q. Where do you live?
A. I live on Arsenal Island.
Q. How long have you resided on Arsenal Island?
Ans. About nine years.
Q. On that part of the island where you now live—on what side of the middle of the stream is it?

41 A. It is about the center of the stream. When I first arrived there, there was more channel on the east side than on the west side of the island; now since the Government closed the dyke it makes more water on the west side.

Q. How long ago did you move onto the island?
A. It is near on to nine years ago.
Q. At that time when you moved there, you say the main channel was on this side of the island?
A. The main channel was on the east side—the Illinois side; steamboats could pass there then in the lowest waters; when they could find water nowhere deep enough they could pass there on the east side.
Q. At that time, then, when you moved there you lived on the other side of the channel—on the Missouri side?
A. On the Missouri side.
Q. Since then the main channel has changed, and the main channel is on the other side?

42 A. On the other side.

Q. About how long ago did it change?
A. About four years ago; changed to the Missouri side.
Q. When you moved there, what State was you a citizen of at that time?
A. St. Louis, Missouri; that was my home at that time.
Q. How long had it been your home?
A. Since '39.
Q. You were a citizen of Missouri?
A. Yes.
Q. Have always voted there?
A. Yes, sir.
Q. Have you voted there since you moved down to the island?
A. No, sir.
Q. Have you ever voted on this side?
A. No, sir.
Q. What did you consider your home?
A. Missouri.
Q. Have you ever intended to move to this State—to apply for citizenship in this State?

A. No, sir.

Q. Did you intend to leave the State of Missouri or did you intend to move back?

43 A. Move back to St. Louis.

Q. Where is your family?

A. St. Louis.

Q. When you moved to the island what was your intention with regard to moving back to St. Louis?

A. My children were all in St. Louis. My wife died and that was the reason I left St. Louis and settled on the island.

Q. What was your intention with regard to returning—what is it now?

A. I moved onto the place and thought when I could do any better again in St. Louis I would go back to St. Louis.

Q. What State do you consider yourself a citizen of now?

A. I don't know; Missouri is my home.

Q. You never voted here?

A. No, sir.

Cross-examination:

Q. Were you born in this country?

A. No, sir.

Q. You were naturalized?

A. Yes, sir; I became a citizen when I became of age; I came here young.

Q. You say you have not voted since you moved on this island?

44 A. No, sir, not in St. Louis; because you had to be registered if you wanted to vote, and I did not vote any more on that account.

Q. I understand they would not allow you to vote any more, is that it?

A. No, sir; I did not live in a ward.

Q. You say you did not live in any ward and could not register?

A. After I left there I did not register any more because I was staying over here; I always have voted before that time.

Q. This land that you live on is now part of the State of Illinois?

A. That is more than I can tell. It might belong to Illinois and might belong to Missouri. I do not know; I cannot tell.

Q. I am asking whether it is not on this side, the east side of the Mississippi river?

A. There is more channel on the Missouri side. I did not hear anything, whether it belong- to Missouri——

Q. At the ordinary state of water, or at low-water stage, is

45 there any water running on the east side of the island at all?

A. No, sir; no water running through at right low-water mark.

Q. No river running through there between the island and the Illinois shore?

A. No, sir; not running through.

Q. You can walk to the shore?
A. Yes, sir; I have done it this summer.
Q. You have a house there, have not you?
A. Yes, sir.
Q. Your family lives with you?
A. I have none; my wife died a long time ago. I have my youngest child with me.
Q. Lives with you at this place?
A. Yes, sir.
Q. That is your home, then?
A. Yes.
Q. You have no other home, then?
A. I don't know; I live on the island now for the last nine years.
Q. You have no other residence except in this place where you live?
A. No.

Re-examination:

Q. What is the reason there is no water running there at
46 low-water stage? What has been done to the island?

Objected to.

A. The part where the Government fence is, there is where the bed is dry.
Q. State whether you ever voted on the island. You say you were a citizen of Missouri. You voted there?
A. Yes, sir; before I moved there.
Q. State whether you ever had the intention of changing your citizenship.
A. Not at all.

Cross-examination:

Q. Have you ever voted since living on the island?
A. No, sir; not since I have been living on the island.
Q. You have not voted at the city election in East St. Louis?
A. No, sir; neither place.

And thereupon they read also the deposition of J. G. JOYCE as follows:

My name is John G. Joyce; my residence, St. Louis; my age, 44 years; I am a civil engineer and surveyor.

Q. State whether you ever made a survey of the islands
47 called Arsenal Island, situated opposite of the city of St. Louis, in the Mississippi river.

A. I made a survey of Arsenal Island in the winter of 1880, which is shown on this plat.
Q. Made it with reference to St. Louis and also the surveys on the Illinois side?
A. Yes, sir; I connected it afterwards with the surveys on the Illinois side, in the spring following; that was in 1881, March or April.

Q. State whether you run the shore lines on the Illinois side and the Missouri side.

A. Yes, sir; I ran shore lines on the Missouri side, I think, in the spring of 1880, and I ran the shore lines of the Illinois side in the spring of 1881.

Q. Now, state what is the position of the island in regard to the lines of surveys between surveys 148 and 149 and between 156 and 157.

A. By continuing the lines of these surveys to the island the line between survey 148 and 149, I should think, would come about in the middle of the islands, the way it looks.

Q. Part of the island, then, would be north of the northern-
48 most part of the survey lines?

A. Yes, sir; would be north of the continuation of those lines, and there would be some more of it south of the continuation of the division line between survey 156 and 157, so that these survey lines between 149 and 156 projected through the island would, we might call, split—leave a portion south and a portion north.

Q. Are you acquainted with Benjamin Seeger?

A. I am.

Q. Do you know where he lives?

A. I do.

Q. On what part of the island does he live?

A. He lives on the north end.

Q. Then his residence is north of the prolongation of these surveys?

A. He would live to the north of it, of the norther-most line.

Q. Now, on what part of the island does he live with reference to east and west?

A. It lays right at the river bank. I would call it the northwest end of the island, on the river bank, right close, say within 150 feet.

49 Q. That is where he has been living all the time?

A. Since my recollection.

Q. Now, how is his residence located with reference to the centre thread of the river, from bank to bank? I mean by measuring from the Illinois bank to the Missouri bank.

A. He will be closest to the Missouri bank.

Q. Then calling the centre thread of the river the division line between bank and bank, the middle line, he would live west of the line?

A. Yes, sir; he would live west of that line; live west of the centre line, between the banks.

Q. What is the depth of the water between that part of the island where he lives now and the Illinois shore, as compared with the depth of the water from the west bank to the Missouri shore?

A. So far as that matter is concerned, there is literally no navigable water on the east side there; two dams are built from the Illinois shore out into the river.

Q. But there is water there?

A. There is water there.

50 Q. What is the width of that water?

A. About 1,800 feet.

Q. And on the other side?

A. About 2,000 feet.

Q. In low stage there is no water there?

A. In low stage there is no water there. It appears to me, had it not been for the dams it would be navigable; steamboats could pass.

Cross-examination:

—. The river runs on the west side of the island entirely now, does not it?

A. On the west side.

Q. How long has it been running there?

A. Since I recollect, to my certain knowledge. I don't know how long before, but it has been the steamboat channel for the last ten or twelve years.

WITNESS: The red lines on this map represent the survey made by me, with the exception of the Missouri shore, which is black, and was also made by me.

Mr. KUEFFNER: Then the line between survey 147 and 148 extended would still leave Seeger living north of that line?

A. The north line of 146 would still run south of Seeger's residence.

51 Mr. HALBERT: Mr. Seeger has the island fenced in, has not he?

A. I don't believe.

Q. He is trying to hold possession of it as against Rembauer, is not he?

A. I seen him planting over the island. The southern end of it is not practical to cultivate.

Q. He cultivates some of these surveys opposite Rutz's shore?

A. Yes, sir.

Mr. KUEFFNER:

Q. State how many feet he is west of the centre line, where he resides.

A. About 800 feet.

Signature waived.

And they submitted also the following stipulation:

In the Circuit Court of St. Clair County, Illinois. May Term, 1884.

EDWARD RUTZ
vs.
BENJAMIN SEEGER *et al.* } Ejectment.

It is hereby agreed and stipulated between the parties hereto that

it shall stand admitted in this cause that the said city of St.
52 Louis was at the time of the commencement of this suit and ever since has been and still is a municipal corporation under the laws of the State of Missouri, situated in the State of Missouri, and that said Edward Rutz was at the time of the commencement of this suit and ever since has been and still is a citizen and resident of the State of Illinois, and that the matter and amount and value of the property in dispute and controversy in this suit and for which this suit was brought exceeds, exclusive of costs, the sum and value of five hundred dollars.

R. A. HALBERT,
Attorney for Rutz.
WILLIAM C. KUEFFNER,
Att'y for Def'ts.

And the plaintiff Rutz, to maintain the issues on his part, read in evidence the deposition of G. F. HILGARD as follows:

Mr. HALBERT: What is your name and business?

A. G. F. Hilgard; I am a surveyor. I have been engaged in that business for about twenty-six years in St. Clair county.

53 Q. Are you acquainted with the Mississippi river, opposite the common fields of Prairie Du Pont and the village of Cahokia?

A. Very well; yes, sir.

Q. Do you know Arsenal Island, in the Mississippi river?

A. Yes, sir; I have known that island for about twenty years.

Q. In what part of the Mississippi river is that island situated in reference to the Illinois or the Missouri side?

A. It is about in the middle of the old banks of the river.

Q. At the present time?

A. It is in the east side of the present channel, on the Illinois side.

Q. State how long that island has been on the east side of the Mississippi river.

A. It has been on the east side of the channel as long as I know it, except a short time when St. Louis built a dyke and threw the channel on the other side.

Q. How long has the island been on the east side of the Mississippi river?

A. It has been on the east side of the channel as long as I know it, except the short time when St. Louis built a dyke and
54 threw the channel on the other side, and then the Government made St. Louis take up a portion of that dyke, so that the channel run on the west side of the island again.

Q. How is that island situated in reference to surveys 148 and 156 of the common fields of Prairie Du Pont?

A. If you extend those lines just stated they will run over the island.

Q. In reference to the centre thread of the river, how much would it take—the whole island—between these two lines?

A. A portion of the island.

Q. If those lines are extended to the centre thread of the river does it leave any island on the west side of the centre thread of the river between those lines extended?

A. Of course not.

Q. Did you make any observations in regard to that island last summer?

A. Yes, sir. I surveyed there; I extended those lines over a portion of the island to the west side.

Q. How was the island in reference to the shore? Was
55 any water between the island and the Illinois shore?

A. On the south part of the island there was some water; on the north side there was hardly any. We walked across on foot to the island from the Illinois side.

Cross-examination:

Mr. KUEFFNER: Used not the main channel to be east of the island?

A. It was only when the city of St. Louis built a dyke there. For a short time it was on the east side.

Q. When was that?

A. About four or five years ago. I don't exactly know. I never seen any boats going in there—only from what people told me. I never seen boats there.

Q. Many years ago was not the main channel on the east side of the river?

A. Not to my recollection.

Q. To the best of your information?

A. No. It might have been before my time, but not since I can recollect. The channel was on the west side of the island even in 1854. I was in St. Louis at the time, and the main channel was on the west side of the island.

56 Q. Do you know how it was eight, nine, or ten years ago? Was not at that time the main channel on the east side?

A. That might have been the time the dyke was built. I understood that then the boats passed on the east side of the island, but I never saw them pass.

Q. What do I understand by extending north and south the lines of these surveys to the centre thread of the channel; where would the centre thread be?

A. The centre thread would be on the west side of the island.

Q. If you take the old banks of the river, where would the centre thread be then?

A. The old original banks surveyed in 1850. The channel was always on the west side of the island, but I cannot judge from personal observation.

Q. You do not know that of your own knowledge?

A. No, sir; as far as I know the channel was never on the east side of the river, except when St. Louis made that dyke there.

57 It filled up on the west side and opened the channel on the east side, consequently the Government built a dyke and shut up that slough that keeps the channel on this side.

Q. As I understood you, the effect of building a dyke by the city of St. Louis was to throw the main channel over on the east side?

A. Of course that was their object. The effect was that it filled up the channel on the west side of the island and left the channel on the east side; that was the effect.

Q. For awhile, then, the channel was on the east side, and then the Government built a dyke on the east side?

A. The Government built a dyke and made St. Louis take up part of their dyke, so the channel was turned where it was before.

Q. About how long ago did the Government commence to build that dyke?

A. I think it was about eight or nine years ago.

Q. It was longer than that?

A. I can get the notes; the plat that will show. The dyke was built in 1878. They built a low dyke through and afterwards raised it.

58 Q. Then the effect of the dyke of the Government was to throw the main channel on the west side of the island?

A. Yes, sir; we found but little water in the channel on the east.

Q. That was in low-water mark, I presume?

A. No, sir; you could pass there. I passed there in winter time.

Q. That was low water?

A. It was winter. It was not so very low. It was after the ice had melted. There was a small stream ran there; we walked through it; it was not more than about a foot or a foot and a half deep.

Q. Is there any water there on the east side in high water?

A. When high water there is a channel there; there is a channel there now.

And this was all the evidence; and thereupon the court denied the said petition of said Seeger and city of St. Louis for a removal as aforesaid; to which action of the court in denying said
59 petition said Seeger and said city of St. Louis then and there severally excepted.

And whereas the matters aforesaid do not fully appear of record, said Seeger and city of St. Louis present this their bill of exceptions and pray that the same may be signed and sealed by the court and made a part of the record in this case; which is done this 29th day of December, 1884.

WM. H. SNYDER, *Judge.* [SEAL.]

STATE OF ILLINOIS, } ss:
St. Clair County, }

I, Frederick E. Scheel, clerk of the circuit court of St. Clair county, in the State aforesaid, do hereby certify the above and foregoing to be a true and correct copy of summons, declaration, general issue of B. Seeger, general issue of St. Louis city, amended plea of St. Louis city, orders of court, petition for removal, &c., bond for removal, &c., answer to petition for removal, &c., bill of exceptions

(2), and that the same is a complete record in a certain cause
60 lately pending in said court on the law side thereof, wherein Edward Rutz was plaintiff and Benjamin Seeger *et al.* were defendants.

In witness whereof I have hereunto set my hand and
[SEAL.] affixed the seal of said court, at Belleville, this 3d day of January, A. D. 1885.

FRED. E. SCHEEL, *Clerk*,
By HENRY FINK, *Deputy*.

(Endorsed:) Filed January 5, 1885. J. A. Jones, clerk.

And afterwards, to wit, on the same day and year last aforesaid (January 5th, 1885), being Monday, and at the January term of said circuit court of the United States, the following proceedings were had and entered of record in said cause, to wit:

Order Placing Case on Docket of U. S. Court.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } 6878. Ejectment.

61 And now, on this 5th day of January, 1885, come the defendants, by their counsel, and file a full transcript of the proceedings had in this cause in the circuit court of St. Clair county, Illinois, and move the court to take jurisdiction and proceed with the trial and disposition of the cause; and the court having heard and considered said motion, it is ordered by the court that the same be sustained and that the cause be placed on the docket of this court.

And afterwards, to wit, on the 19th day of January, in the year last aforesaid, there was filed in the said clerk's office a copy of the order of court made January 5th, 1885, in said cause, together with an acknowledgement of service endorsed thereon, which are in the words and figures following, to wit:

Copy of Order of Jan'y 5, '85, and Service on Pl'ff's Att'y.

In the Circuit Court of the United States for the Southern District of Illinois.

MONDAY, *January 5th, A. D.* 1885.

Present: Hon. Samuel H. Treat, district judge.

62 EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

And now, on this 5th day of January, 1885, come the defendants, by their counsel, and file a full transcript of the proceedings had in this cause in the circuit court of St. Clair county, Illinois, and move the court to take jurisdiction and proceed with the trial and

disposition of the cause; and the court having heard and considered said motion, it is ordered by the court that the same be sustained and that the cause be placed on the docket of this court.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, J. A. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of the order of court this day entered in a certain cause wherein Edward Rutz is plaintiff and Benjamin Seeger and The City of St. Louis are defendants, as
63 appears of record in my said office.

In testimony whereof I have hereunto set my hand and
[SEAL.] seal of said court, at Springfield, in said district, this fifth day of January, A. D. 1885.

J. A. JONES, *Clerk.*

(*Acknowledgement of Service.*)

STATE OF ILLINOIS, } ss:
County of St. Clair, }

I, R. A. Halbert, attorney for Edward Rutz in the case of Edward Rutz *vs.* Benjamin Seeger and The City of St. Louis, hereby acknowledge & have on this 7th day of January, 1885, received a duly certified copy from the attorney of said defendants of the order of the U. S. circuit court for the southern district of Illinois, of which the foregoing is a copy.

R. A. HALBERT,
Att'y for Rutz.

(Endorsed:) Filed January 19, 1885. J. A. Jones, clerk.

And afterwards, to wit, on Tuesday, the 2d day of November, at the June term of said court, in the year of our Lord
64 one thousand eight hundred and eighty-six, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order Setting Cause for Hearing.

EDWARD RUTZ
vs. } Ejectment.
BENJAMIN SEEGER *et al.*

By stipulation on file this cause is set for hearing on the 5th day of November inst.

And afterwards, to wit, on the 3d day of November, in the year last aforesaid (1886), the following stipulation was filed in said cause, to wit:

Stipulation to Waive Jury.

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

In the Circuit Court of the United States in and for said District.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and CITY OF ST. LOUIS. } Ejectment.

It is hereby stipulated and agreed that the trial of this
65 cause by jury shall be, and is hereby, waived, and that said cause may be tried by the court without the intervention of a jury.

Dated October 13th, 1886.

R. A. HALBERT,
EDSALL & EDSALL,
Attorneys for Plaintiff.
W. C. KUEFFNER,
Attorney for Defendant.

(Endorsed:) Filed Nov. 3, 1886. J. A. Jones, clerk.

And afterwards, to wit, on Thursday, the 10th day of November, at the June term of said court, in the year of our Lord one thousand eight hundred and eighty-seven, the following further proceedings were had in said court and entered of record in said cause, to wit:

Order upon Hearing Cause.

EDWARD RUTZ
vs.
BENJAMIN SEEGER *et al.* } 6878. Ejectment.

This day comes as well the plaintiff, by Messrs. James K.
66 Edsall and R. A. Halbert, his attorneys, as the defendants, by Messrs. L. Bell and W. C. Kueffner, their attorneys, and the issue joined is tried by the court, a jury being waived by stipulation in writing, and the court, having heard the evidence and arguments of counsel, takes the same under advisement.

Testimony of Aug. A. Blumenthal.

Nov. 10, 1887.

AUGUST A. BLUMENTHAL was called as a witness for the plaintiff on the trial, and, being duly sworn, testified as follows:

I am August A. Blumenthal, whose testimony or deposition was taken in this case about a year ago. I have been present here in court while my testimony then taken was read to the court and heard it read. I reside in South St. Louis, which is now a part of the city of St. Louis, Missouri; but it was formerly called Carondelet. I have always resided in sight of the land in controversy and part of

the time on these surveys 149 to 156, in the Prairie Du Pont
67 common fields, as stated on my former examination. I stated in my former examination that the river cut off about half a mile from the front of these surveys, now owned by Rutz, the plaintiff, before it stopped cutting. During most of the time this cutting was going on I lived on these surveys, as before testified by me, and the latter part of this time I lived right in sight of these premises on the opposite side of the river. In October, 1874, I moved over to Carondelet, now called South St. Louis. During the last five or six years I lived there on the premises it went or cut away very fast. It cut off the lands very rapidly along in the seventies until the dike was built on this side. It caved off all the time, more or less, but it was worse during the spring rise in the river. The cutting away of the land took place mostly during the spring rises. The spring rises or floods of high water in the river would vary in their duration, lasting from four to eight weeks before the water would subside to its usual level. During each
68 spring rise or flood of high water at that time the river would usually cut away from two hundred and fifty to three hundred feet from off the river front of the land in question. I could see it cut away the lands; I could see the land go. The bank would cave off and fall into the river in blocks or masses of earth from ten to fifteen feet wide. I frequently saw such chunks falling into the river. I could see that we were losing land in this way while the cutting was going on and from day to day during that time. In 1862 or 1863 the house on the lands was about one-half a mile back from the water's edge of the river. In 1872 the river was unusually high and the cutting away of the lands was very rapid. The house on the land was then about four hundred or five hundred feet back from the river bank. The bank commenced to cave in rapidly and I became alarmed. We thought we were in immediate danger and commenced removing the house. We worked all day Sunday
69 at that and the river followed us up right close. It took four or five days to take the house down and remove it.

When we got the house away the bank was so cut away that the river was not further from the place where the house had stood than from here to the railing (indicating a distance of about twenty feet). We were engaged about four or five days in removing the house. These four or five hundred feet disappeared in those four or five days. The land where the house stood caved off, except the foundation of the "L" of the kitchen, and that stood until the next spring, when that also caved in with about one hundred feet more of the land. All this cutting away of the land or bank of the river was principally in the times of high water in the spring of the year, which lasted from four to eight weeks. On the Missouri side of the river they built a dike some distance above this land, which is there yet. The city of St. Louis built this dike. I saw its harbor boat dumping stone in there. The building of this dike had the effect to throw the current of the river over to
70 the Illinois side, so as to strike the northern part of these surveys and cut the land away, as before stated. As nearly

as I could judge from the appearance ,the dike is what caused the river to cut this land away so fast at that time.

On cross-examination by counsel for defendants the witness said:

In 1863 the house was back about half a mile from the water's edge. In about 1872 the river reached the house, as before stated. In a period of about ten years the river encroached eastwardly about a half a mile. The river cut off most at the upper end of these surveys.

Redirect examination:

In 1873 what is called Arsenal Island had not got down in front of these premises. It was then further up the river. When the steamboats in the river ran east of this island the island was further up the river and not in front of these premises. The boats have not run between the island and these surveys since the island
71 got down there.

About half a mile of the dry land, as it existed on the river front of these surveys in 1863, was washed away by 1873 and was then a part of the channel of the river. It has since filled up so that it is dry land in front of these surveys all the way out to the western side of what is called Arsenal Island, as stated in my former testimony.

(Endorsed:) Filed February 11, 1888. J. T. Jones, clerk.

And afterwards, to wit, on the 11th day of February (being Saturday), at the January term of said court, in the year of our Lord one thousand eight hundred and eighty-eight, the following further proceedings were had in said court and entered of record in said cause, to wit:

1*st*. *Judgment for Plaintiff.*

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } 6878. Ejectment.

72 On this day came again the parties, by their counsel, and the court, being now fully advised in the premises, finds the issues for the plaintiff; that the plaintiff is seized of an estate in fee of the following-described lands, as alleged in the declaration, to wit, a certain parcel of land situate in the county of St. Clair and State of Illinois, viz: Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine (149) in the common fields of Prairie Du Pont, from which the souther-most corner of said survey number one hundred and forty-eight (148) at the bluffs bears south thirty-three and one-half (33½) degrees east (var. six degrees) two hundred and forty-nine and twenty-five one-hundredths (249.25) chains, thence north thirty-three and one-half (33½) degrees west with said line of said survey extended to the centre thread of the Mississippi river;

thence down along the centre thread of said river to the line between surveys one hundred and fifty-six (156) and surveys one hundred and fifty-seven (157) extended to said centre thread of said river, making the right-angle distance between the said extended lines
73 thirty-four and sixty one-hundredths (34.60) chains; thence south thirty-three and one-half (33½) degrees east along said last-mentioned extended lines to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-six (156) bears south thirty-three and one-half degrees east two hundred and fifty-four chains distant; thence along the meanders of the original bank of the Mississippi river, as surveyed by the United States Government in surveying said common fields, to the point of beginning; and that the defendants are guilty of wrongfully withholding the possession thereof from the plaintiff, as alleged in the declaration, and assesses the plaintiff's damages at the sum of one cent.

It is therefore considered by the court that the plaintiff recover the possession of the said lands, and that he recover his damages assessed as aforesaid from the defendants, and that he have
74 a writ of possession therefor: and it is further considered by the court that plaintiff recover of the defendants his costs of suit in this behalf expended and taxed at the sum of fifty dollars and ten cents, and that he have execution therefor against the defendant, Benjamin Seeger, and that the defendant, The City of St. Louis, pay such costs so adjudged against the defendants in due course.

And thereupon, on the said 11th day of February, in the year last aforesaid, the following "findings of facts" by the court was filed in clerk's office in said cause, to wit:

Findings of Facts. Feb'y 11, 1888.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1888.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment. Gen. No. 6878.

This cause having been heretofore, to wit, on the 10th day
75 of November, 1887, in pursuance of the written stipulation of counsel for the respective parties, on file herein, heard and tried by the court, without a jury, and the court having considered the evidence, including the admissions and agreements as to facts made by the respective parties upon the trial, and having also heard the arguments of counsel, thereupon took the case under advisement; and now, on this 11th day of February, 1888, the court, being sufficiently advised in the premises, doth find the following facts:

1. That in the year 1849 one August A. Blumenthal acquired and then owned the title in fee to surveys numbered 149, 150, 151,

152, 153, 154, 155, and 156 of the common fields of Prairie Du Pont, in the county of St. Clair, in the State of Illinois, and that Edward Rutz, the plaintiff in this suit, acquired from said Blumenthal his said title to said lands prior to the commencement of this suit.

2. That the map or plat made by G. F. Hilgard, county surveyor of St. Clair county, Illinois, produced in evidence and marked
76 "Plaintiff's Exhibit B," is a correct map and plat of said premises and of the several surveys and lines indicated thereon, which said map is included in and made a part of these findings, and to which reference is had for greater certainty.

3. That it appears from the evidence, field-notes, and plats in evidence that said surveys numbered 149, 150, 151, 152, and 155 are each one arpent (or about twelve rods) in width, and the said surveys 153 and 154 are each two arpents (or about twenty-four rods) in width, and that the said survey numbered 156 is three arpents (or about thirty-six rods) in width, and that said several surveys adjoin each other and lie side by side in the order the same are respectively numbered, survey 149 being upon the extreme northerly and survey 156 being upon the extreme southerly side of the entire tract, and that each and all of said surveys extended to and were bounded by the Mississippi river on the northwesterly ends thereof and extend southeasterly from the Mississippi river, the
77 average distance of about one thousand rods, to the hills or bluffs on the Illinois side of said river.

4. That the said title of the said Blumenthal to said lands so acquired and held by the said plaintiff is derived from and based upon the title and claim of the inhabitants of the village of Prairie Du Pont, mentioned in the report of the commissioners, Michael Jones and E. Backus, dated at the commissioners' office, Kaskaskia, December 31st, 1809, read in evidence from vol. II of the "American State Papers, Public Lands," commencing on page 167 of said volume, and which report was confirmed by section three of the act of Congress of February 20th, 1812, entitled "An act for the revision of former confirmations and for confirming certain claims to lands in the district of Kaskaskia," contained in 2 U. S. Stat. at Large, pages 667 and 668; and it appears from the said report of said commissioners that the tract of land therein described and awarded to the said claimants as inhabitants of the said village of Prairie Du Pont, together with certain land awarded to the inhabi-
78 tants of the village of Cahokia, was "bounded on the west by the Mississippi, including the adjacent islands, beginning a quarter of a league above the little river Cahokia and extending south and east, for quantity," so as to contain "a tract of four leagues of land square."

5. That said Blumenthal, in the year 1849, after he had acquired title to said surveys in said Prairie Du Pont common fields as aforesaid, took possession under his deeds of the property mentioned in said surveys, and that his actual possession never extended further west than the eastern edge of the Mississippi river, and that the

plaintiff Rutz succeeded to the possession of said lands of the said Blumenthal prior to the commencement of this suit.

6. That the premises described in the declaration and sued for are located at the present time and were at the commencement of this suit eastwardly of the center of the main channel of the Mississippi river, in the county of St. Clair, in the State of Illinois.

7. That there was no dry ground formed in the Mississippi
79 river in the year 1850 in front of the water's edge, as it then existed, opposite to the said land of the said Blumenthal on the main shore.

8. That, as appears from a survey of said lands made by William L. Deneen, as the county surveyor of St. Clair county, Illinois, on November 15th, 1850, at that time the dry land of said surveys numbered 149 to 156, inclusive, extended westwardly to the line indicated by the words "River bank, 1850, by Deneen," on the map marked "Plaintiff's Exhibit B," and that the main land of said surveys numbered 149 to 156, inclusive, in the year 1850 extended westwardly over and across and included about sixty rods in width of the lands described in the declaration, to wit, that portion of said lands lying between the river bank in 1850, as indicated by said Deneen's survey, and the line marked "Old surveyed river bank, 1814," as said lines are respectively designated on said map; and that in the year 1863 the main and dry lands of the surveys 149 to 156 extended about fifteen chains or sixty rods further west-
80 ward and beyond the line of the river bank so surveyed by said Deneen in 1850; and that the eastern bank of the river in 1863 was about one-half a mile west of a dwelling-house hereinafter mentioned, then standing on survey No. 151.

9. That the greater part of the so-called "Arsenal Island," which now extends over and is embraced within the boundaries of the lands described in the plaintiff's declaration, is located upon the site of the dry land of said surveys numbered 149 to 156, inclusive, as the same existed from 1850 to 1863; and that the residue thereof (being about ⅛ of the entire width of the same) is located upon the bed of the Mississippi river as it then existed, and lies easterly of the thread or middle line of said river.

10. That between the years 1863 and 1873 the river front of the said surveys numbered 149 to 156 was washed away, so that in July, 1873, the river front of said lands only extended to the line marked "River bank, 1873," on said map; and that said river bank
81 thereafter continued to wash away and cave in until it reached the line marked "River bank, 1884," on said map.

11. And the court further finds from the evidence that such washing away of said river bank did not take place slowly and imperceptibly; but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away occurred, principally, at the rises or floods of high water in the Mississippi river which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks before the waters of the river would subside to its ordinary stage or level; that during such floods there was usu-

ally carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which could be seen and perceived in its progress; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and was carried away; that in the spring of the year
82 1872 Mr. Blumenthal, the occupant of the land, lived in the dwelling-house situated on survey No. 151, and the river had previously encroached upon the land, so that the house was then about four or five hundred feet back from the river bank and water's edge, as it then existed. When the spring rise or flood occurred that year the said Blumenthal became alarmed for the safety of his house and immediately commenced taking the same down and removing it further from the river bank, and in so doing worked for four or five days in succession, at the expiration of which time the bank had caved in and washed away so rapidly that the bank and waters of the river had approached within twenty feet of the place where the foundation of the house stood, before the waters subsided, — carried away the greater portion of the foundation of the house; that such caving in and washing away continued until the building of the dyke on the eastern side of the river above said lands by the United States Government in the year 1876.

83 12. That said washing away on the front of the said surveys was caused by dikes built by the city of St. Louis on the western side of the river, at the points where the same are indicated on said map, by causing the current of the river to flow over to and against the eastern shore and against the lands of the plaintiff; that the western bank of the river, opposite the plaintiff's land, is rocky, and there appears to have been no material change in the same since the first survey thereof by the United States Government

13. The court further finds that in 1853 there existed an alluvial formation or body of land on the western side of the river near the Missouri shore, then called Quarantine Island, which in that year (1853) was surveyed by William H. Cozzens. The location and boundaries of said island *is* indicated upon said map, the same being shaded red and having written thereon the words and figures "Quarantine Island, also called Arsenal Island, as surveyed in 1853." In 1858 said island, in low water, extended to and
84 adjoined the main land on the western or Missouri side of the river. At some time between the years 1853 and 1863 the greater portion of said Quarantine Island washed away so as only to leave remaining that portion thereof embraced within a second survey thereof made by said Cozzens in January, 1863, the location and boundaries of which are indicated upon said map by the words "Survey No. 411 of St. Louis lands, school lands, Arsenal Island, as surveyed in 1863," the letters and lines thereof being shaded green upon said Exhibit "B."

14. Said Quarantine Island, since its resurvey in 1863, has been called Arsenal Island, and at the time of said surveys in 1853 and 1863 the same was situated on the west side of the main channel of the Mississippi river and about two miles further up in the

river than the lands described in the declaration, and no part of the same then extended down the river opposite the plaintiff's lands.

15. On February 10th, 1863, a part of said island, designated as "Survey No. 411 of St. Louis school lands" (containing
85 109.92 acres), was assigned to the St. Louis public schools in pursuance of the act of Congress of May 13th, 1812, entitled "An act making further provision for the settling claims of land in the Territory of Missouri" (2 U. S. Stat. at Large, p. 748), and of the supplementary act of May 26th, 1824 (4 U. S. Stat. at Large, p. 66), and the residue of said island, as so surveyed in 1863, being nine and sixty-five hundredths acres on the northern end thereof, appears to have been also assigned to said St. Louis public schools on August 25th, 1864, "as indemnity for school lands lost in section 16, T. 45 N., range 7 east, of the St. Louis district, Missouri."

16. By deed dated February 8th, 1866, the St. Louis public schools conveyed said Quarantine or Arsenal Island to the city of St. Louis, which lands are described as *as* situated "in the county of St. Louis and State of Missouri."

17. The court further finds that there is not now and was not at the time of the commencement of this suit any land whatever above the surface of the water in said river on the site or within the boundaries of said island as surveyed in 1853, nor upon
86 the site or within the boundaries of said island as resurveyed in 1863, but that the same was wholly washed away.

18. The court further finds that in the floods before mentioned large portions of the upper or northern end of said island washed away; that in the flood of 1875 the entire graveyard, forming a part of said island, was thus washed away; that in such floods a bar formed each year immediately below and joined to the foot of the island, extending down the river for the distance of a quarter of a mile or more; that when the waters subsided after such a spring flood the surface of such bar appeared in sight above the surface of the water, but nearly on a level with the water; that during the first summer after such a bar had formed, willows grew upon it, and the flood occurring the next succeeding spring deposited more sand and soil on the bar, which was retained by the willows, and the bar so formed was raised higher in each successive annual flood, so long as it was overflowed in high water, and this process was repeated at each succeeding flood by the formation of another bar imme-
87 diately below that formed by the preceeding flood, which in turn was covered with a growth of willows and raised higher by each succeeding flood, or until it ceased to be overflowed.

19. The court further finds that such bars were not formed by the accumulations of sand or soil washed up against the lower end of the island, but by deposits in times of flood of soil and sediment upon the bed of — river.

20. The court further finds that before said island was washed away the main and navigable channel of the Mississippi river was eastwardly of the island, but that after bars formed lower down the river in front of the plaintiff's land the main and navigable channel of the river has been and still is on the west side of the

bars, and that since the said bars or island had so formed in the river in front of said surveys the boats navigating the river have not run between the bar and the bank of the eastern or Illinois shore of the river.

21. The court further finds that in or about the year 1876
88 the United States Government built a dike from the eastern or Illinois shore of the river to the bar or island as it then existed, about sixty rods northerly or higher up the river than the north line of the plaintiff's land, and which said dike is indicated on said map by line having the word "dyke" written beneath the same; and that in or about the year 1878 the United States Government built a dam above said dike from a point near the head of bar or island to the eastern or Illinois shore on the line designated "dam" on said map; and that after said dike and dam were built the flow of the water through the channel or space occupied by water between the said bar island which had so formed in front of the river bank of plaintiff's land, as it existed at that time, was thereby impeded, and the channel or space gradually filled up by deposit from the river, so that by the year 1884 the same had become dry land from the line in front of said surveys marked "River
89 bank, 1884," to the western side of the land opposite said surveys as indicated on said map, and that the same has since continued to be and is now dry land, and that the lands described in the declaration embraces so much thereof as lies westerly of the line marked on said map with the words "Old surveyed river bank, 1814," and easterly of the middle thread of the Mississippi river.

22. The court further finds that the lands described in the plaintiff's declaration are situated in the county of St. Clair, in the State of Illinois, and that the plaintiff is and was at the time of the commencement of this suit the owner in fee of the said lands described in the declaration.

23. And that the value of the said lands in controversy in this suit exceeds sixteen thousand dollars.

W. Q. GRESHAM,
Circuit Judge.

(Endorsed:) Filed February 11, 1888. J. T. Jones, clerk.

90 And afterwards, to wit, on the 17th day of April, in the year last aforesaid (1888), came the defendants, by their attorneys, and filed in said clerk's office their motion for new trial in said cause, which is in the words and figures following, to wit:

Motion for New Trial.

In the Circuit Court of the United States for the Southern District of Illinois. January Term, 1888.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS.

Come now the said defendants, by Leverett Bell and Wm. C. Kueff-

ner, their attorneys, and move the court to set aside and vacate the finding and judgment heretofore rendered herein and to grant them a new trial under the statute for the following reasons:

They have paid all costs recovered herein within one year from the rendition of said judgment.

By LEVERETT BELL AND
W. C. KUEFFNER,
Their Attorneys.

(Endorsed:) Filed April 17, 1888. J. T. Jones, clerk.

91 And thereupon, on the day and year last aforesaid (being Tuesday, and at the January term of said court), the following further proceedings were had in said court and entered of record in said cause, to wit:

Order Granting New Trial.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } 6878. Ejectment.

This day comes the defendant, The City of St. Louis, by Leverett Bell, Esq., its attorney, and enters its motion to set aside the judgment rendered herein on the 11th day of February, 1888, and for a new trial under the statute; and it appearing to the court that all the costs taxed in said cause have been paid by the defendant, The City of St. Louis, it is therefore ordered that said judgment be vacated and set aside and a new trial awarded under the statute.

92 And afterwards, to wit, on the 5th day of July, in the year last aforesaid, came the parties, by their attorneys, and filed in said clerk's office their stipulation in said cause, which is in the words and figures following, to wit:

Stipulation Waiving a Jury.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1888.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

It is stipulated and agreed by and between the parties to this suit that the right of trial by jury herein be, and the same is hereby, waived, and this cause may be tried by the court without the intervention of a jury.

Dated July 5th, 1888.

EDSALL & EDSALL,
Att'ys for Pl'ff.
LEVERETT BELL AND
W. C. KUEFFNER,
Att'ys for Defendants.

(Endorsed:) Filed July 5, 1888. James T. Jones, clerk.

93 And thereupon, on the day last aforesaid (being Thursday and at the June term of said court), the following further proceedings were had in said court in said cause and entered of record, to wit:

Order upon 2d Trial of Cause.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } 6878. Ejectment.

This day comes as well the plaintiff, by Messrs. Edsall and Edsall and A. S. Wilderman, his attorneys, as the defendants, by Messrs. Leverett Bell and William C. Kueffner, their attorneys, and the issue joined is tried by the court, a jury being waived by stipulation in writing; and the court, having heard the evidence and arguments, takes the same under advisement.

And afterwards, to wit, on Monday, the 1st day of April, at the January term of court, in the year of our Lord one thousand eight hundred and eighty-nine, the following further proceedings
94 were had in said court and entered of record in said cause, to wit:

2d Judgment for Plaintiff.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } 6878. Ejectment.

And now, on this 1st day of April, 1889, comes the plaintiff, by James K. Edsall, his attorney, and also come the defendants, by their attorneys; and this cause having been heretofore tried by the court without the intervention of a jury, in pursuance of the written stipulation of the parties, signed by their attorneys, respectively, and filed in this court, whereby they waived a trial by jury and submitted the cause to the court for trial—

And the court having heretofore heard the evidence offered by the respective parties and the arguments of counsel thereon of the several parties and taken the case under advisement and being now sufficiently advised in the premises—the court finds that the defendants are guilty of unlawfully withholding from the plaintiff
95 the certain lands and premises described in the first count of the declaration, situated in the county of St. Clair, in the State of Illinois, to wit: Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine (149), in the common fields of Prairie Du Pont, from which the souther-most corner of said survey number one hundred and forty-eight (148), at the bluffs, bears S. 33½° E. (var. 6°) two hundred and forty-nine and $\frac{25}{100}$ (249.25) chains, thence north 33½° W. with said line of said surveys extended to the center thread of the Mississippi river; thence along the center

thread of said river to the line between survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157), extended to said center thread of said river, making the right-angle distance between the said extended lines 34.60 chains; thence south 33½° E. along said last-mentioned extended line to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-
96 six bears south 33½° east two hundred and fifty-four chains distant; thence along the meanders of the original bank of the Mississippi river, as surveyed by the United States Government in surveying said common fields, to the point of beginning, with the appurtenances; and that the plaintiff, at the time alleged in the declaration, owned and now owns said lands in fee in manner and form as alleged in the declaration.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover from the defendants the possession of said lands and premises in fee according to the said finding of the court, to wit: Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine (149), in the common fields of Prairie Du Pont, from which the souther-most corner of said survey number one hundred and forty-eight (148), at the bluffs, bears S. 33½° E. (var. 6°) two hundred and forty-nine and $\frac{25}{100}$ (249.25) chains, thence north 33½° W. with said line of said surveys extended to the center thread of the Mississippi river; thence along the center thread of
97 said river to the line between survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157) extended to said center thread of said river, making the right-angle distance between the said extended lines 34.60 chains; thence south 33½° E. along said last-mentioned extended line to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-six bears south 33½° east two hundred and fifty-four chains distant; thence along the meanders of the original bank of the Mississippi river, as surveyed by the United States Government in surveying said common fields, to the point of the beginning, with the appurtenances, situated in the county of St. Clair and State of Illinois.

And that the plaintiff do also have and recover from the defendants his costs, amounting to $—, in this suit and have execution of this judgment according to law and the force, form, and effect of his said recovery of said lands, and have a writ of possession therefor.

98 And afterwards, to wit, on Monday, the 4th day of November, at the June term of said court, in the year last aforesaid (1889), the following further proceedings were had in said court and entered of record in said cause, to wit:

Order Overruling Motion for New Trial and Allowing Writ of Error.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } 6878. Ejectment.

This day this case came on to be heard upon motion of defendants heretofore entered for a new trial herein, and the court, having heard argument of counsel and being sufficiently advisd, overrules said motion.

Whereupon defendants tender their bill of exceptions, which is signed, sealed, and ordered by the court to be made a part of the record in this case.

On motion of defendants, by their attorneys, a writ of error
99 to the Supreme Court of the United States is allowed on defendants entering into bond to plaintiff in the penalty of one thousand dollars within sixty days from this date, and with security to be approved by the clerk of this court.

And thereupon, to wit, on the day last aforesaid (November 4th, A. D. 1889), came the defendants, by their attorneys, and filed in said clerk's office their bill of exceptions in said cause, which was signed and sealed by the court, and is in the words and figures following, to wit:

Bill of Exceptions.

In the Circuit Court of the United States for the Southern District of Illinois. June Term, A. D. 1888.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Gen. No. 6878. Ejectment.

Be it remembered that during the progress of this cause the following proceedings were had:

Proceedings and Evidence at the Trial of the Cause on July 5, 1888.

Be it remembered that on the 5th day of July, A. D. 1888,
100 the above-entitled cause came on for trial in this court, and in pursuance of and upon the written stipulation of the parties, signed by their respective counsel, on file in this court, that a jury shall be waived and that this cause shall be submitted to the court for trial without the intervention of a jury, the plaintiff, to maintain the issues on his part, introduced the following evidence, testimony, and proofs, to wit:

a. Deeds, &c., Showing Plaintiff's Title.

It is established by the proof in this case that the property in controversy has a value in excess of sixteen thousand dollars.

A deed from Narcissus Dushanau and wife and Francis Lacroix and wife, dated December 20, 1849, recorded December 27, 1849, in Book W, page 61, St. Clair county records, conveying to Augustus

A. Blumenthal surveys numbers 149, 150, 151, 152, and 153 of the common field land of Prairie Du Pont, in St. Clair county, Illinois.

A deed from Narcisse Pensoneau and wife and Harriet S. Pensoneau and Louis P. Pensoneau, dated January 23, 1850, recorded January 25, 1850, in Book W, page 242, St. Clair county records, conveying to Augustus A. Blumenthal surveys numbers 154, 155, and 156 of the common field land of Prairie Du Pont, in St. Clair county, Illinois.

A deed from Augustus A. Blumenthal and wife to Edward Rutz, Gustavus F. Hilgard, Washington Bushnell, Charles E. Lippincott, and Malcolm Henderson, dated December 23, 1873, recorded January 12, 1874, in Book X 5, page 81, St. Clair county records, conveying the following-described property, to wit:

Being the northwestern part of surveys numbered one hundred and forty-nine (149), one hundred and fifty (150), one hundred and fifty-one (151), one hundred and fifty-two (152), one hundred and fifty-three (153), one hundred and fifty-four (154), one hundred and fifty-five (155), and one hundred and fifty-six (156), in the Prairie Du Pont common fields, commencing the survey thereof at a
101 mulberry post on the old surveyed bank of the Mississippi river on the line between surveys numbered one hundred and fifty-six (156) and one hundred and fifty-seven (157), in said common fields as established by Wm. L. Deneen, and from which post a mulberry nine (9) inches in diameter bears north forty-one and one-half degrees (41½ deg.) west twenty-nine and one-fourth (29¼) links and an elm twelve inches (12 in.) in diameter bears north three and one-half (3½) degrees east thirteen (13) links, thence along said division line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) south thirty-three and one-half (33½) degrees east (var. 7 deg.) one hundred and fifty-six and sixty-hundredths ($156\frac{60}{100}$) chains to a post, from which the corner between said surveys number (156) one hundred and fifty-six and one hundred and fifty-seven (157) at the bluff bears south thirty-three and one-half degrees (33½) east (var. 7 degrees) ninety-eight and sixty-two hundredths ($98\frac{62}{100}$) chains distant; thence north fifty-six and one-half degrees (56½) east (var. 7 deg.) twenty-six and fifteen-hundredths ($26\frac{15}{100}$) chains to a post on line between surveys number one hundred and fifty-one (151) and one hundred and fifty-two (152); thence north thirty-three and one-half degrees (33½), west twelve and fifty-two hundredths chains ($12\frac{52}{100}$) to a post on said line; thence north fifty-six (56) and a half degrees (56½) east (var. 7 deg.) eight and seventy-three hundredths chains ($8\frac{73}{100}$ chains) to the line between surveys number one hundred and forty-eight (148) and one hundred and forty-nine (149); thence along this line north thirty-three and a half (33½) degrees west one hundred and forty-two and fifty-one hundredths ($142\frac{51}{100}$) chains to the present bank of the Mississippi river; thence along the extended line between survey number one hundred and forty-eight (148), one hundred and forty-nine (149),
north thirty-three and one-half degrees (33½ deg.) west to
102 low-water mark of the Mississippi river; thence down to the extended line between surveys number one hundred and fifty-

six (156), one hundred and fifty-seven (157); thence south thirty-three and one-half deg. (33½) east (var. 7 deg.) to the point of beginning, excepting from the above-described tract of land thirty (30) acres conveyed by party of the first part to W. B. Quigly by deed recorded in Book M 4, page 152, and the tracts conveyed for the right of way to the American Bottom Board of Improvement by deed recorded in Book L 5, page 610, and Q 5, page 8, and to the American Bottom Lime, Marble, and Coal Company, recorded in Book Q 5, page 92; also that part of said tract of land sold to the St. Louis and Cairo Railroad Company by deed recorded in Book —, page —, in the recorder's office of said St. Clair county, the tract hereby conveyed containing 500 acres, more or less; together with all rights as riparian owner to the accretion or sand bar lying northwestwardly and between the extended lines of said land herein described, situated in the county of St. Clair and State of Illinois.

A deed of trust for the same premises by Edward Rutz and the other grantees in the last-mentioned deed, viz., Bushnell, Henderson, Lippincott, and Hilgard, and their wives all joining in the deed, dated December 23d, 1873, to William C. Plass and Augustus A. Blumenthal, Junior, to secure payment of promissory notes purporting to be for part of the consideration for the conveyance aforesaid of the same lands. It was duly acknowledged by all these parties and their wives and appears to have been filed for record January 12th, 1874, and recorded in Book X 5, page 83, in the recorder's office of St. Clair county, Ills.

A trustees' deed made by William C. Plass and Augustus A. Blumenthal, Junior, as trustees named in the last deed for the same premises, surveys 149 to 156, inclusive, in the Prairie Du Pont common fields of St. Clair county. It is dated January 24th, 1878, and is to Orlin H. Miner.

103 A deed from Orlin H. Miner and wife for the same premises, surveys 149 to 156, inclusive, to Edward Rutz and Washington Bushnell. This deed is dated January, 1878, and is acknowledged under the date of January 25th, 1878, before a notary public. It was filed for record January 31st, 1878, and recorded in St. Clair county, in Book 145, page 559.

A deed from Washington Bushnell and wife to Edward Rutz, dated March 19, 1883, for an undivided half of the same surveys, 149 to 156, inclusive. It refers for a particular description to the deed before offered in evidence from Blumenthal to Edward Rutz and others, recorded in the recorder's office in Book X 5, page 81. This deed was recorded April 10th, 1883, in Book 171 at page 88.

A deed from Bushnell and wife to Edward Rutz, dated March 7th, 1883, and recorded March 10th, 1883, in Book 170, page 35, for an undivided half of the premises.

A certified copy of the field-notes of these same surveys 149 to 156, inclusive, as follows:

Certified copy of the original field-notes of private surveys, Illinois, so far as the same relate to surveys numbered 149 to 156, inclusive, and known as claims numbered 1098, 1450, 1454, 1439, 1453, 1180, and 750, in Prairie Du Pont common fields.

b. Original Field Notes as to Surveys 149 *to* 156.

Survey No. 149. Record No. 1098.

Surveyed for the heirs of Francoise Grondine. Beginning at a stake on the Mississippi river, lower corner to F. Trotier, from which a cotton 9 in's dia. bears S. 10 W. 17 l'ks, a do. 8 in's dia. bears N. 72 E. 11 links, thence with Trotier's line S. 41 20 E. 997 to a stake at the hill, from which a red-bud 8 in's dia. bears N. 38 E. 20 lk's and a sycamore 18 in. dia. bears S. 9 W. 16 l'ks; thence with the hill S. 26 W. 14 po. to a stake, from which a red-bud 10 in's dia.
104 bears N. 59 W. 16 l'ks, a hackberry 7 in's dia. bears N. 15 W. 14 lks; thence N. 41 20 W. 998 po. to a stake on the b'k of the river, from which a sycamore 4 in's dia. bears S. 44 W. 4 l'ks, a cotton 5 in's dia. bears N. 23 E. 25 l'ks; thence N. 28 E. with the river 12 po. to the beginning, containing 72 a. 19 po.

Survey No. 150. Record No. 1450.

Surveyed for Clement Allary 72 a. 138 po. of land. Beginning at a stake on the M. river, lower corner to Grondine, from which a cotton 3 in. dia. bears N. 41 W. 10 l'ks, a sycamore 10 in. dia. bears N. 45 W. 10 l'ks, thence with Grondine's line S. 41 20 E. 998 po. to a stake at the hill, from which a red-bud 10 in's dia. bears N. 59 W. 16 l'ks, a hackberry 7 in's dia. bears N. 15 W. 14 l'ks; thence S. 26 W. 14 po. to a stake, from which a red-bud 8 in. dia. bears N. 72 W. 25 l'ks; thence N. 41 20 W. 1,000 po. to a stake on the river, from which a sycamore 4 in. dia. bears S. 44 W. 4 l'ks, a cotton 5 in. dia. bears N. 25 E. 25 l'ks, N. 28 E. 12 po., to the beginning.

Survey No. 151. Record No. 1454.

Surveyed for Jean Baptiste Chartran 72 a. 157 po. Beginning at a stake on the M. river, lower corner to C. Allary, No. 150, from which a sycamore 4 in. dia. bears S. 44 W. 4 l'ks, a cotton 5 ins. dia. bears N. 25 E. 25 l'ks, thence with his line S. 41 20 E. 1,000 po. to a stake at the hill, from which a red-bud 8 in. dia. bears N. 72 W. 25 l'ks; thence with the hill S. 26 W. 14 po. to a stake, from which an ash 6 in. dia. bears N. 23 E. 3 l'ks and a mulberry 4 in. dia. bears S. 35 E. 7 l'ks; thence N. 41 20 W. 1,002 po. to a stake on the river, from which a sycamore 11 in. dia. bears S. 84 W. 7 l'ks, a do. 7 ins. dia. bears N. 51 E. 24 l'ks; thence N. 28 E. 12 po. to the beginning.

Survey No. 152. Record No. — (not entered).

105 Surveyed for Jean Baptiste Gendron 73 a. 10 po. of land. Beginning at a stake on the b'k of the Mississippi river, lower corner to J. B. Chartran, No. 151, from which a sycamore 11 in. dia. bears S. 84 W. 7 l'ks and a ditto 7 in. dia. bears N. 51 E. 24 l'ks, thence with J. B. Chartran's line S. 41 20 E. 1,002 po. to a stake at the hill, from which an ash 6 in's dia. bears N. 23 E. 3 l'ks,

a mulberry 4 in's dia. bears S. 35 E. 7 l'ks; thence with the hill S. 26 W. 14 po. to a stake, from which a hickory 5 in's dia. bears N. 66 W. 5 l'ks, a red-bud 5 in. dia. bears N. 65 E. 11 l'ks; thence N. 41 20 W. 1,002 po. to a stake on the river, from which an elm 14 in. dia. bears S. 38 W. 10 l'ks and a cotton 6 ins. dia. bears S. 39 E. 16 l'ks; thence up the river N. 28 E. 12 po. to the beginning.

Survey No. 153. Record No. 1439.

Surveyed for Louis Gendron 146 acres and 50 po. Beginning at a stake on the River Mississippi, lower corner to J. B. Gendron, from which an elm 14 in. dia. bears S. 38 W. 10 l'ks, a cotton 6 in. dia. bears S. 39 E. 16 l'ks, thence with Gendron's line S. 41 20 E. 1,002 po. to a stake at the hill, from which a hickory 5 ins. dia. bears N. 66 W. 5 l'ks, a red-bud 5 ins. dia. bears N. 65 E. 11 l'ks; thence with the hill S. 26 W. 28 po. to a stake, a B. O. 6 in. dia. bears east 15 l'ks, a red-bud 5 in's dia. bears 36 links; thence N. 41 20 W. 1,008 po. to a stake on the b'k of the river, from which a sycamore 7 in. dia. bears N. 25 W. 7 l'ks and an elm 11 ins. dia. bears S. 37 W. 3 l'ks; thence N. 34 E. 24 po. to the beginning.

Survey No. 154. Record No. 1453.

Surveyed for Jean Baptiste Chartran 147 a. 20 po. of land. Beginning at a stake on the Mississippi river, lower corner to L. Gendrons, No. 153, from which a sycamore 7 in. dia. bears N. 25 W. 7 l'ks, an elm 11 ins. dia. bears S. 37 W. 32 l'ks; thence with Gendron's line S. 41 20 E. 1,008 po. to a stake at the hill, from which a B. O. 6 ins. dia. bears east 15 l'ks, a red-bud 5 in. dia. bears 36 l'ks; thence
106 S. 26 W. 28 po. to a stake, from which a red-bud 7 in. dia. bears S. 11 W. 23 l'ks, a do. 12 in's dia. bears N. 52 E. 20 l'ks.; thence N. 41 20 W. 1011 po. to a stake on the river, from which a cotton 5 in's dia. bears N. 32 11 l'ks, a do. 6 in's dia. bears S. 14 E. 20 l'ks; thence up the river N. 34 E. 24 po. to the beginning.

Survey No. 155. Record No. 1180.

Surveyed for Louis Garvais, in right of Poryard, 73 a. 123 po. Beginning at a stake on the Mississippi river, lower corner to J. B. Chartrans, No. 154, *lower corner to J. B. Chartrans, No. 154*, from which a cotton 5 in. dia. bears N. 32 E. 11 l'ks, a do. 6 in. dia. bears S. 41 E. 20 l'ks, thence S. 40 20 E. 1,011 po. to a stake at the hill, from which a red-bud 7 in. dia. bears S. 11 W. 23 l'ks and a do. 12 in. dia. bears N. 52 E. 20 l'ks; thence S. 26 W. 14 po. to a black walnut 5 in. dia. bears N. 50 W. 15 l'ks and an elm 9 in. dia. bears S. 50 W. 27 l'ks; thence N. 41 20 W. 1,014 po. to a stake on the b'k of the river, from which a cotton 7 in. dia. bears N. 60 W. 36 l'ks, a do. 6 in. dia. bears N. 8 W. 46 l'ks; thence N. 34 E. 12 po. to the beginning.

Survey No. 156. Record No. 750.

Surveyed for John F. Perry 222 a. 5 po.. Beginning at a stake on the Mississippi river, lower corner to Garvais, No. 155, from which

cotton 7 in. dia. bears N. 60 W. 36 l'ks and a do. 6 in. dia. bears N. 8 W. 4 l'ks, thence with Garvais line S. 41 20 E. 1,014 po. to a stake, at the hill, from which a black walnut 5 in. dia. bears N. 50 W. 15 l'ks and an elm 9 in. dia. bears S. 50 W. 27 l'ks; thence with the hill S. 26 W. 21 po. S. 21 W. 16 po. to a stake from which a red-bud 5 in. dia. bears S. 80 E. 13 links and an elm 6 in. dia. bears N. 84 E. 35 l'ks; thence N. 41 20 W. 1,016 po. to a stake on the river, from which a cotton 24 in. dia. bears N. 80 W. 7 l'ks, a sycamore 18 in. dia. bears E. 19 l'ks; thence up the river with the meanders N. 28 E. 36 po. to the beginning.

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AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *November 5th*, 1886.

I, Charles P. Swigert, auditor of public accounts of the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full, and correct copy of the original field-notes of "Private surveys, Illinois," so far as the same relate to surveys numbered 149 to 156, inclusive, and known as claims numbered 1098, 1450, 1454, 1439, 1453, 1180, and 750, now on file in and forming part of the records of this office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

CHAS. P. SWIGERT,
Auditor of Public Accounts.

[SEAL.]

c. Testimony of A. A. Blumenthal.

AUGUSTUS A. BLUMENTHAL, Jun., sworn.

Direct examination by Mr. EDSALL:

Q. What relation are you to the Augustus A. Blumenthal who was grantor in the deed read in evidence to Edward Rutz and others?

A. I am his son.

Q. Are you acquainted with the surveys 149, 150, 151, 152, 153, 154, 155, and 156 in the Prairie Du Pont common fields in St. Clair county, in this State?

A. Yes, sir.

Q. How long have you known that property?

A. Ever since father bought it.

Q. About what year?

A. It was along in 1849 or 1850.

Q. Have you the original deeds your father got in your possession?

A. Yes, sir.

Q. You can take them out and refer to them if you wish—deeds or anything of that kind; you know when your father bought this land?

A. Yes, sir.

108 Q. You know the parties from whom he bought?

A. Yes, sir.

Q. Where were they living at that time—Lacroix and Pensoneau?

A. Lacroix was living in Cahokia; Pensoneau in Prairie Du Pont.

Q. Who had possession of these lands at the time your father bought them?

A. Lacroix and Pensoneau.

Q. In actual possession at that time, were they?

A. Yes, sir.

A. At the time your father took deeds for that land in 1849 and 1850 who had possession of the same up to 1873—till it was deeded to Edward Rutz and others?

A. I was there and some more people, tenants of his.

Q. Who was in possession—who were you there under?

A. My father.

Q. Your father, Augustus A. Blumenthal, had possession?

A. Yes, sir.

Q. What buildings, if any, were there on the land?

A. Well, the house that I lived in was a two-story frame, which cost pretty near three thousand dollars.

Q. When did you go to live on the land?

A. It was in the winter of 1863 and 1864—along about the end of the year 1863; went over on the ice; the river was closed.

Q. Do you know who paid the taxes on the land while your father owned it from 1850 to 1873?

A. My father.

Q. Have you the tax receipts?

A. Yes, sir.

Q. I will offer them in evidence formally. There is a large batch of them. I will give the dates of these receipts. Tax receipts for surveys 149 to 153, inclusive, paid 1850, for the taxes of 1849, signed by the county collector of St. Clair county.

Tax receipt for surveys 154 to 156, same year, separate receipts, forty-nine.

Also tax receipt for the taxes of 1851 on surveys 149 to 156.

Tax receipt for the year 1852 on the same surveys, 149 to 156.

109 Tax receipt for 1853 on these surveys signed by the county collector.

Tax receipt for 1854 on these surveys.

Same for 1855 on these surveys.

Same for 1856.

Also for 1857.

Also for 1858 and 1859 and the year 1860, and for the years 1861, 1862, 1863, 1864, 1865, and 1866 on all these surveys, 1867 on all the surveys and for the years 1868, 1869 on all these surveys and in 1870 on two of the surveys, 155 and 156; and another receipt for 1870 on the other surveys from 148 to 154, which makes them all.

Also a tax receipt dated June 21st, 1872, on all the surveys for the year 1871.

I will also put in evidence these other receipts, although I have got already more than I need—more than seven consecutive years—but since I have them here I will put in receipts on surveys 149 to 153 in 1847 and also on surveys 149 to 153 for the taxes of 1849, and on surveys 154 to 156 for the taxes of 1849 and on surveys 154 to 156 for the taxes of 1848, and on surveys 154 to 156 for the taxes of 1847 and on surveys 154 to 156 for the taxes of 1846, and on surveys 153 back to 149 for the year 1846.

(To the witness:) You stated that your father had actual possession of the property from 1849 and 1850, the date of these deeds, up to the time he sold out to Edward Rutz and others under the deed read in evidence in 1873?

A. Yes, sir.

Q. He occupied it by his tenants and part of the time you were one of his tenants?

A. Yes, sir.

Q. What part of the premises did you occupy?

A. On the western end of the surveys on the river bank.

Q. Western end of the surveys?

A. Yes, sir.

Q. You stated you moved over there in the winter of 1863 and 1864?

A. Yes, sir.

Q. And you moved into the house then on the premises?

A. Yes, sir.

110 Q. Will you state how far back from the river bank as it was in the winter of 1863 and 1864 this house stood into which you moved at that time?

A. Very nearly half a mile back from the river.

Q. Do you remember the fact of your father having the premises surveyed in 1850?

A. Yes, sir.

Q. What surveyor did he have to make the survey?

A. William L. Deneen.

Q. What office did he hold?

A. County surveyor of St. Clair county.

The COURT: When did he have them surveyed?

A. 1850.

Q. Did you personally know of that survey?

A. Yes, sir; I carried the flag—ran three lines through.

Q. What lines did he run?

A. The north line of 149 and the south line of 156—division between us—gentlemen from Washington city.

Q. Ran the north line of survey 149 and the south line of survey 156?

A. Yes, sir.

Q. And you also meandered along the river bank?

A. Yes, sir.

Q. Were you with him when that was done?

A. Yes, sir.

Q. Was the river bank at that time further westward or further eastward than the old surveyed bank?

A. Further westward.

Q. Did the survey cross the space between the old river bank and the bank as you found it in 1850?

A. Went out to the river.

Mr. BELL: Did not go west of the water line?

Q. Did not survey in the river, I suppose?

A. No, sir.

Q. But you surveyed out to the water's edge?

A. Yes, sir.

Q. And meandered along the water's edge?

A. Yes, sir.

Q. On this piece of land which had formed between the old surveyed bank of the river and the bank as you found it in
111 1850 when Deneen made the survey. How did Deneen run the line across it as compared with the south line of these surveys?

Mr. BELL: What do you mean by old survey?

Q. On this plat marked old river bank.

Mr. BELL: What year was that surveyed?

Q. 1814 are the figures given here.

Mr. BELL: What does this witness know about that survey? He was not born then.

Q. He knows about the line of the survey.

Mr. BELL: I don't understand him to have said so.

Q. I am asking the witness. You ran across this land which had formed between this line marked with yellow letters as the old survey of 1814 to the margin of the river, as Deneen found it in 1850. How did he run the survey?

A. Ran straight out to the river.

Q. Extended the south line in a straight course to the water?

A. Yes, sir; and our fence was built right on this line.

Q. Your fence was on a straight line right to the river?

A. Yes, sir.

The COURT: Parallel with this line?

A. This line here (pointing to the south line of survey 156, as represented on Exhibit B): this line here. These people from Cahokia would come and cut wood, and father had this (pointing to a space along the north line of survey 149, as represented on Exhibit B) cut out thirty feet wide so as to mark it; had a road thirty feet wide cut through, and afterwards built a fence on that, and then they hauled off the rails—in 1862 had a fence, and they hauled the rails all up to Cahokia.

Mr. BELL: Where was the western boundary when Deneen ran his line?

A. The river was the western boundary.

Mr. BELL: Is it marked there?

Q. The west line?

Mr. BELL: Is that the line?

Q. That's Hilgard's.

Mr. BELL: I want to know what this witness knows about it. Where is the western line of Deneen?

A. It is along in here somewhere.

112 Mr. BELL: Where is the old survey line?

Q. This plat was made by Hilgard and can be explained by him.

Q. You made some statement about building your fence out to the river. On what line did you build your fence across the accretions?

A. On the line of the arpents. Survey went straight out to the river.

Q. I understand the survey of the Prairie Du Pont common fields extends straight to the river instead of bending off south across the accretions?

A. Yes, sir.

Q. I understood you to state that people owned surveys next south of one hundred and fifty-six and next north of one hundred and forty-nine. How did they occupy the space in front of their surveys out to the river—how did they extend their lines across the accretions?

A. Just the same as we did.

Q. Was there ever any dispute between these different occupants as to how their lines should be extended across the accretions?

A. No, sir.

Q. For the whole twenty years from the time you first knew it this is the way you occupied until you sold to Rutz in 1873?

A. Yes, sir.

Q. When you moved over there in 1863 you said the river bank was some distance. How far west of the house?

A. A half a mile between me and the river nearly.

Q. That was the winter of 1863 and 1864. How soon after you moved there did that bank commence to cut away?

A. In 1865 and 1866 it commenced caving in pretty bad.

Q. Commencing caving off rapidly in 1865 and 1866?

A. Yes, sir.

Q. What particularly called your attention to the caving-off of the bank?

A. Used to have a lot of wood out on the bank. Set it a considerable distance back. Was taking this wood away to a brickyard we had at Carondelet. Made me lots of trouble to move that wood back.

Q. Had to move your wood back?

A. Yes, sir.

Q. Why did you have to move it back?

A. Fall in the river if I didn't.

113 Q. On account of the bank washing away?

A. Yes, sir.

Q. When had you placed the wood there before this attempt to move it back occurred?

A. Hauled it there in the spring.

Q. How often did that occur that you had to move your wood back from the river bank to prevent it falling into the river?

A. Every time there would be a rise.

Q. During what years?

A. Let us see—1865, 1866, 1867, and I think 1868.

Q. At what period or season of the year would these rises occur?

A. Sometimes along in May or June and sometimes earlier.

Q. About how many weeks on an average would each spring rise or flood of water last?

A. Well, all the way from four to eight weeks and sometimes even longer.

Q. What would be the average length of time?

A. About six weeks anyhow.

Q. You stated that it commenced cutting away rapidly, you noticed, along about 1865 and 1866 after you went there. About how much land would go in a single spring rise or flood of four to six weeks' duration?

A. Well, that varied a good deal—all the way from fifty to a hundred feet sometimes in a rise that way—cut off a strip all along.

Q. Could you see it go?

A. Yes, sir.

Q. State the circumstances in detail about it—the manner in which the land would wash away there.

A. The bank was very high and there was a stratum of coarse sand below on this ground and the current running in under there would make it slip down in chunks from ten to fifteen feet wide—went down all at once.

Q. How often would that occur?

A. It would go on day and night for awhile. Then maybe it would stop and commence at another point. It would cave out in an eddy like at one place and then that would stand a long while maybe.

Q. How much would go in a day and night?

A. It would go very fast.

114 Q. When it was cutting rapidly?

A. Pretty near a block of ground would cave off there in a day or two sometimes.

Q. When you say a block what do you mean—city blocks?

A. Yes, sir.

Q. The amount of a city block would cave off in a day or night sometimes?

A. Yes, sir.

Q. And you could see it go in these chunks and masses?

A. Yes, sir.

Q. How did it continue up to 1872?

A. Kept on that way. It was some four or five hundred feet away from my house. I was still living in the house. Started there along

about the middle of the day and commenced to cave. I would go to work and move out—had a house a little further down in the field fixed up; took my things out; worked all that night taking out the casings. My father said when it got to going to save what we could of it, and we worked all that night and took out the casings; had some more men there and kept on at it afterwards; took us some seven or eight days to take it down. It was built up on a one-story rock foundation, which we intended to fill up around for a cellar, but found it caving, so we wouldn't spend any more work on it.

Q. The house?

A. Yes, sir. It was put up very strong, an up-and-down house, boarded up with inch boards and weather-stripped tight and plastered. It was a good deal of work. We worked like everything and by the time we got it down the river was right at the corner of the foundation.

Q. And when you commenced the river bank was four or five hundred feet west of the house?

A. Yes, sir.

Q. What year was that?

A. Along in the year 1872, as near as I remember.

Q. Before 1872 the bank had worn away from a half a mile west of the house till within four or five hundred feet of it?

A. Yes, sir.

Q. In that spring the caving was such that you were
115 alarmed and commenced taking the house down?

A. Yes, sir.

Q. How long did it take you to take the house down?

A. A little over eight days; got it down and it stopped caving; the house was built with an ell to it back here and a space pretty large here with a porch where there was no foundation. It caved on back to the foundation under the kitchen part, where it stayed till the next spring and then that caved off. A well was under that—under the kitchen.

Q. Then, I understand, in the same flood, 1872, it came up to the back part of the foundation?

A. Yes, sir.

Q. Then it stopped and no more went that year?

A. No, sir.

Q. Left the foundation of the ell—the kitchen where you had a well?

A. Yes, sir.

Q. And in the next spring—1873?

A. Caved off and went way back of it again.

Q. How far back?

A. I guess it must have taken in a hundred feet back.

Q. The spring flood of 1873 took away a hundred feet eastward of the house?

A. Yes, sir.

Q. Were you there when this property was surveyed in 1873 by Hilgard?

A. Yes, sir.

Q. Here is a map. Mr. Hilgard will be here this afternoon, who made the map, and it will be explained by him. It locates the house spoken of by this witness. That is the river bank in 1873, and in the spring of 1872 the house must have stood about a hundred feet westward of this river bank. On which one of these surveys did the house stand?

A. One fifty-one, I believe.

Q. Survey 151 would be there (pointing to survey 151, as represented on Exhibit B). After it got back to the river bank as it was surveyed in 1873—the survey made by Mr. Hilgard, who also made this map—did it continue cutting away after that?

A. Yes, sir.

Q. On the map here is a line marked river bank 1884. Did
116 the water ever cut back as far as that line? You are familiar with this map, are you?

A. Yes, sir; I have seen it. I saw it had cut back that far. I left in 1874.

Q. In 1863, when you moved on this land and took possession of these surveys, with the river bank as it was then, where was this body of land then called Arsenal or Quarantine Island?

A. Just a little below the arsenal.

Q. Was it in front of these premises at all?

A. No, sir.

Q. Which side of the river?

A. West side of the river.

The COURT: Which side?

A. The west side.

Mr. BELL: The Missouri side?

A. Yes, sir.

Q. Did you notice anything in particular which caused or apparently caused a movement or flow over against the Illinois side opposite these surveys in 1865, 1866, 1867, 1868, and 1869, when it fell away there so rapidly?

A. They had a dyke put away below the arsenal, which was driving the water over there.

Q. Who had that dyke put in?

A. The city of St. Louis.

Q. The dykes are indicated on the map here, which is marked Exhibit "B?"

A. Yes, sir.

The COURT: Where is that?

Q. Here is one and here is another (pointing to the dykes on the Missouri side of the river, as represented on Exhibit B).

A. Here is one. The island was just along in here then.

The COURT: This is water here now?

A. Yes, sir; at the present time. Here is the island now—all dry land over there eastward.

The COURT: How is it now—about the same elevation?

Q. I will ask the witness. Do you remember this bank where the river finally cut away back into the land where survey was

made in 1884 and subsequently it was filled up? Did it fill up as high as it was before?

A. No, sir.

Q. Was it dry land in 1884 clear across?

A. Yes, sir; you could walk over, but it was low.

Q. I understand you can still see what was the river line in 1884—didn't fill up full; all covered by water now, isn't it?

A. Yes, sir; the river is high all through there.

Mr. BELL: Over Arsenal Island?

A. No, sir.

117 Mr. BELL:

Q. A slough is between the main land and the island, but the island isn't covered with water?

A. Not all, but part of it is.

Mr. BELL:

Q. A house on it?

A. Down opposite these surveys I don't think you can find much dry land there, except, perhaps, on the west bank.

Q. Where have you resided since you moved from these surveys, in 1874?

A. Just southwest of there, at Elwood street, Carondelet, on the west side, down the river there.

Q. You live on the opposite side of the river, on what was formerly called Carondelet?

Mr. BELL: Now the city of St. Louis.

Q. Now the city?

A. Yes, sir; formerly Carondelet—St. Louis now.

Q. Can you see the front of these surveys 149 to 156 from where you live?

A. Well, you can from the upper story of my house; but the island is coming down—growing up in willows there so you can't see as well as we used to.

Q. Before there was any island there you could see the house?

A. Yes, sir.

Q. You have lived in sight of these premises, then, ever since you moved from them?

A. Yes, sir.

Q. When did you first become acquainted with the so-called Arsenal or Quarantine Island?

A. That island I have known ever since I was a little boy—ever since I lived in Carondelet, since 1849.

Q. When you first knew the so-called Quarantine or Arsenal Island where in the river, in reference to its present location, was it situated?

A. Well, it was up near the St. Louis arsenal when I first knew it.

Q. Above or below?

A. About opposite the lower end, I think.

Q. How near the Missouri shore was it at that time?

A. Well, I have known that island to be connected with the
118 Missouri shore altogether. I know we use to haul sand there in 1858 and 1859. I believe in the winter of 1858 we hauled sand from the lower end of it all one winter.

Q. Did you drive your team right on the island?

A. Yes, sir. Then it was all dry all the way up, and the teams hauled right there.

Q. That was in 1858 and 1859?

A. Yes, sir.

Q. The current of the river was then eastwardly of the island?

A. East.

Q. No island at all, then, in front of these surveys?

A. No, sir.

Q. Have you noticed the manner in which the bars formed below the island down to and in front of these surveys? If so, describe to the court as near as you can how it is.

A. It would cave off at the upper end and would form—sort of a bend there and the river would fill; there would be a bar come up there and willows, cottonwood, and stuff would grow up, and the next rise this would keep getting higher and extend away off below.

Q. Where would the bar form, at the upper or lower end?

A. The lower end.

Q. How long would that bar be which would form in one flood or spring rise of four to eight weeks' duration?

A. A long ways—sometimes two or three blocks long.

Q. Referring to the width of city blocks?

A. Yes, sir.

Q. City blocks vary. How long would you say?

A. Say a quarter of a mile.

Q. When the water subsided would it all be uncovered at some time?

A. It would be lowest at the lower end.

Q. First, small willows would grow on the bar?

A. Yes, sir.

Q. Thick growth all over it?

A. Yes, sir.

Q. What would take place after that?

A. The willows would grow. They would catch sand and it would fill up below.

Q. About how long would be the next bar?

A. About the same length.

Q. What would take place on the next bar?

119 A. Whenever there is a bar of that kind no time would pass till it filled up—willows grow up—just come right up.

Q. Then when the next flood comes those willows catch the sand and hold it?

A. Yes, sir; and the bar always gets higher.

Q. In this manner I understand these bars came down and formed in front of these surveys?

A. Yes, sir.

Q. At the point which is marked on the map to be the island?

A. Yes, sir.

Q. Till finally the bars have extended away below these surveys?

A. Yes, sir; away further than that map shows.

Q. How much further below the point indicated on that map?

A. I guess over half a mile further.

Q. Do the bars that have formed since this map was made extend through to the Illinois shore?

A. Yes, sir; run right through to the Illinois shore—right opposite my house.

Q. Then, as I understand you, when you could see any addition at the lower end of the island you could see the whole quarter of a mile?

A. Yes, sir.

Q. Which it had gained in one flood of the river?

A. Yes, sir.

Q. When you first knew the island, when it was up above the arsenal or about by the arsenal, you state the boats then ran east of the island?

A. Yes, sir.

Q. In the river? How have they run since the island has got where it is now?

A. On the westward.

Q. Have they run on the east side at all since it has been in front of the Rutz surveys?

A. No; the United States Government boats when building that dyke in July—low draft stern-wheel boats—when putting in that dyke ran up there and since they run up once in awhile, but there ain't any boats can go up there since when the water is low.

Q. You speak of the United States Government building a
120 dyke. Do you remember about what year they built that?

A. I think they commenced on that in 1876—worked there a short time.

Q. That is a dyke from the Illinois shore over——

A. To the island.

Q. Is that built at about the point marked on this map?

A. Yes, sir.

Q. Above the line marked dyke is another marked dam?

A. Yes, sir; they put in a lot of piling, brush, and stuff; had a lot of trouble with that first dyke to get it to stand; didn't have the right pitch.

Q. This dyke and dam extend, as indicated on map, Exhibit "B," to the Illinois shore, as indicated here?

A. Yes, sir.

Q. After this dyke was built what took place, if anything, with regard to filling in front of where it had washed away in the space between the line marked survey of 1884 and the sand bars?

A. Sand filled up.

Q. Did it fill up?

A. Yes, sir.

Q. How was it in 1884?

A. Pretty near all dry land when I was over there.

Q. Were you across there in 1884?

A. I forget whether it was in 1884; went over there once in the fall.

Q. Do you remember testifying about that before—about going over there in 1884?

A. Yes, sir; I believe I did.

Q. When you went over there you saw dry land. Point it out—dry land from what point?

A. We landed on the west side of the island.

Q. Came over from the Missouri side and went on the other side?

A. We pulled up in here. Government put in rock along here. Landed here and walked up; came through here; walked over dry-shod. This thing was all grown up with willows; cottonwood and willows that high there (indicating the height of about 3 feet). Dryer over here than there. That was dry land when I went there (pointing to the space intervening between the line marked "river bank, 1884," and the sand bars or island in front of the Rutz surveys, as represented on Exhibit B).

The COURT: Under water now?

A. Yes, sir.

121 Q. Is it at an ordinary stage of water?

A. No; at an ordinary stage there wouldn't be much water there; the water would be further down there.

Mr. BELL: Water running over the dyke now?

A. Yes; of course. The way I noticed—haven't been much over there, but you can see it going up to St. Louis on the main road—you can see across on the island from the street car.

Q. There is now a flood in the Mississippi?

A. Yes, sir.

Q. Is it as high as it was in the earlier flood?

A. Very near it.

The COURT: This is overflowed?

A. No, sir; this goes a good deal further down there—all the way up to here.

Q. Are you acquainted with the character of the bank of the river on the opposite side—the side opposite these surveys?

A. Yes, sir.

Q. State what it is.

A. Rock.

Q. Has there been any material change in the line of that bank of the river since you have been acquainted with it?

A. No, sir.

Q. These changes—washing away and filling in—have taken place on the eastern or Illinois side?

A. Yes, sir.

Q. In what way did you occupy that part of the surveys from 1863 up to 1874 which extended out to the river?

A. Well, I had that fenced up for a pasture. I cut a big lot of cottonwood out there; I don't know; must be a thousand or twelve

hundred cords of wood off there, and I fenced the thing up for a pasture—some fifty or sixty acres of it then; ran my fence right out to the bank; had a fence running up a little ways back from the edge of the river—upon the way to the stable—upon the upper corner the time when it commenced to cave.

Q. Kept your fence back from where it was caving?

A. Yes, sir; let it go; it was cutting off at the upper corner all the time.

122 Q. In these years when you say you piled wood out on the river bank and had to move your wood how near the bank did you place your wood?

A. Generally put it twenty-five or thirty feet back from the edge of the bank; still I would have to move it.

Q. That you did repeatedly?

A. Yes, sir.

Q. Why did you put it near the bank?

A. So men could take it on a flat-boat.

Cross-examination by Mr. BELL:

Q. What year were you born in?

A. 1837.

Q. Whereabouts?

A. City of St. Louis.

Q. Do you live in the city of St. Louis now?

A. Yes, sir.

Q. All your life have you lived in the city of St. Louis and on this ground opposite?

A. I have been on this farm there.

Q. Your father bought this ground in what year?

A. In 1849.

Q. How old were you?

A. Well, I don't know; but I guess I was about ten or twelve years old; right smart of a boy. I know when I went over.

Q. What year were you born in?

A. 1837.

Q. And your father bought this land in 1849?

A. Yes, sir.

Q. Then you were twelve years old?

A. Yes, sir.

Q. Do you know of the fact of the buying of it?

A. Yes, sir.

Q. Go over with him to see it?

A. Yes, sir.

Q. Did you go over on the ground before your father purchased it?

A. Well, we went over there with Mr. Lacroix—walked up over the place, looking at it.

Q. Did you go over before your father purchased it?

A. Yes, sir.

Q. Knew when your father talked about proposing to buy it?

A. Certainly. La Croix and Pensoneau came to the house when they made the trade.

123 Q. Just answer my question—whether as a boy of twelve years old you knew your father proposed to buy this land and you talked with him about it and visited the land with him before he bought it?

A. Yes, sir.

Q. This is bottom land, isn't it?

A. Yes, sir.

Q. Bluff on the Illinois side is about seven or eight miles back from the river?

A. No, sir.

Q. How far?

A. About three miles.

Q. Prairie du Pont common fields extend eastward to the bluffs?

A. Yes, sir.

Q. Do they proceed any further east than the bluffs?

A. No, sir.

Q. Those fields are about three miles in length, are they, from east to west?

A. Maybe a little more than three miles—on an average three.

Q. Do they commence at the bluff and go westward to the Mississippi river?

A. Yes, sir.

Q. And that is a distance of about three miles?

A. Yes, sir.

Q. All bottom land?

A. Yes, sir.

Q. Bottom land subject to overflow in extreme high water, isn't it?

A. Yes, sir.

Q. When was that great flood in the Mississippi—what year—when the steamboats navigated over to the bluffs?

A. Well, there was a big flood there in 1858?

Q. Remember that time?

A. Yes, sir.

Q. This land all under water at that time?

A. No; some high ridges wasn't under water.

Q. Bulk of it under water?

A. Yes, sir.

Q. You living on it at that time?

A. No, sir.

Q. Your father?

A. No, sir.

Q. Your father not living there?

A. No, sir; he never lived there.

Q. This house standing you spoke of?

A. No, sir.

Q. When was it built?

A. In '62.

Q. Who built it?

A. Father.

Q. Any house or improvement on the ground in 1858?

A. O, yes; there was a log-house; several houses on the tract.

124 Q. I mean on your father's ground?

A. I am talking of my father's ground.

Q. Occupied?

A. Yes, sir.

Q. Who by?

A. Menard and Mr. Goodan.

Q. Tenants of your father?

A. Yes, sir.

Q. Did the high water reach those buildings?

A. Came very near.

Q. They were situated on high points?

A. Yes, sir.

Q. Bulk of your father's ground covered with water?

A. Yes, sir.

Q. This ground has the same characteristics with all bottom land bounded by the Mississippi—it is subject to washing away and subject to gains by accretion—is it not? Shifting ground always, isn't it—caving at some seasons of the year and at other times gaining in area—how is that?

A. Well, there is nothing to prevent it from caving because there is no rock on that side.

Q. Nothing to prevent this ground caving three miles back to the bluffs?

A. No; nothing I could see.

Q. And within your experience there the western boundary of this land has always been shifting, hasn't it, from year to year?

A. I can't say; have known the shifting of it while I was there.

Q. Shifted one way along awhile and then shifted another way, didn't it? Isn't that true?

A. I don't know; can't say anything about it except what time I was there.

Q. That's all I am asking you about. Isn't that true while you were there?

A. I saw it go only one way.

Q. Never saw any of it come back?

A. No, sir.

Q. I thought you said you helped Mr. Deneen make his survey?

A. Yes, sir.

Q. Well, he surveyed the river bank, didn't he?

A. Yes, sir; but that land was there when he surveyed it.

Q. When was that?

A. 1850.

Q. You were thirteen years old?

A. Yes, sir.

Q. And from the line of the river, as ascertained by that

125 survey of Deneen's in 1850, the land receded to the eastward over a half a mile, I understand you?

A. Yes, sir.

Q. Down to the year 1873?

A. Yes, sir.

Q. This house you speak of never actually went into the river? The movement eastward stopped when it reached the house?

A. Took in part of it where the house stood before it stopped. Biggest part of the house would have fell in if we hadn't taken it down.

Q. In point of fact the ground covered by the house never did go into the river?

Mr. EDSALL: O, yes.

A. Yes; the biggest part.

Q. Did the ground covered by the house go into the river?

A. Yes, sir.

Q. All of it?

A. The biggest part—all except the kitchen part that was behind the house; that stood till the next spring.

Q. Which way did the house front, east or west?

A. Fronted west.

Q. Looked out on the river?

A. Yes, sir.

Q. Now, the ground on which the house stood didn't go into the river—by that I mean the space occupied by this house didn't go into the river; the river encroached on a portion of the space occupied by the house and there the movement seems to have stopped. Isn't that true?

A. Didn't stop very long.

Q. How soon?

A. Let me explain. There was an ell here. The river got right here and then stopped. We had taken out this part, the water following us with our work. Caved out in here and the kitchen part stood till the next spring, and then that went off and took off a great deal more.

Q. Then the washing next spring proceeded still further eastward?

A. Yes, sir.

Q. Took off how much ground east of the house?

A. Must have took off a hundred feet, if not more.

Q. Did it stop there?

A. No.

126 Q. When did it take off some more?

A. Kept on caving off at each high water. Right below the house it took in the whole of an orchard.

Q. What year was it?

A. 1873.

Q. Passed that?

A. Caving all the while I lived there.

Q. When did you cease to live there?

A. Left in October, 1874.

Q. Did it stop caving then?

A. I don't think it did.

Q. When did it stop?
A. Can't say it did till the dyke was put through.
Q. Didn't they commence work on the dyke in 1873?
A. Didn't see any work there.
Q. What year did you see work on the dyke?
A. I think in 1876.
Q. Did this caving continue till the work was commenced on the dyke?
A. I think it continued some time after that, it looked to me; didn't quit right off.
Q. Tell us what you know as to how long it continued. What year did it stop?
A. I couldn't say year it stopped.
Q. Why not? Weren't you there?
A. No.
Q. Where were you?
A. Over in St. Louis.
Q. Weren't in the habit of going over, were you?
A. No business over there.
Q. What year was it you left?
A. 1874.
Q. You weren't there in 1875?
A. Might have gone over occasionally.
Q. What time in the year 1874 did you move away?
A. October.
Q. Back there any more in 1874?
A. Can't say I was.
Q. Were you there in the year 1875?
A. I did go over once in the winter time in 1875.
Q. Not there during the summer or spring of 1875?
A. No, sir.
Q. There in 1876?
A. Went on the island, I think, in 1876 after they commenced work on the dyke.
Q. Then you don't know anything about the movement of the ground after October, 1874?
A. No, sir.
127 Q. What year did your father die?
A. In 1876, the tenth of March.
Q. Where was he living?
A. In Carondelet—opposite to where I lived.
Q. How long had he lived there?
A. Hadn't lived in the house where he died very long; moved twice before I moved away in October.
Q. How long had he lived in Carondelet?
A. After the cholera, in 1849?
Q. Down to the tenth of March, 1876?
A. Yes, sir.
Q. Carondelet was incorporated into St. Louis in 1870?
A. Yes, sir.

Q. Do you remember the cholera of 1849?
A. Yes, sir.
Q. Do you remember that Arsenal Island was used at that time as a quarantine station?
A. It was used as a quarantine after I lived in Carondelet. That is how I know it.
Q. That was along in 1849 and the years following?
A. Don't know so much about 1849, but I know in 1850 I remember.

Adjourned to 2 o'clock p. m.

Q. Were there any fences on this property when your father bought it?
A. Not that I know of.
Q. Was it afterwards fenced?
A. Yes, sir.
Q. When?
A. Well, there was a part of it fenced along on the west end there—some twenty acres or something like that enclosed. John Menard had a house there.
Q. Fenced on the west line of the property?
A. Towards the west end where I afterwards laid it.
Q. Along the Mississippi river?
A. Yes, sir; not right on the river, but back from the river a little ways.
Q. Running parallel with the river?
A. Yes, sir.
Q. Across the entire western front?
A. Yes, sir.
Q. About how far from the water's edge?
A. I guess about a half a mile from there back. You see in front the land was lower than it was there—kind of low and then it would rise. It wasn't fit to cultivate there in front, anyway.
128 Q. That fence standing now?
A. No fence there now; that place is all in the river.
Q. When was the fence washed away—in what year?
A. Well, the fences were gone before I left there. No fence on the river front the year I left there except a little at the lower end.
Q. Any fence along the river when you left?
A. Not much—a little.
Q. What distance?
A. Well, I should say it wasn't more than about a square—about three hundred feet of fence.
Q. Any fence on the northern or southern line?
A. O, yes; the fence extended out to where the railroad passed through, about a quarter of a mile back.
Q. Any fence on the eastern boundary?
A. Plank fence I built there for the railroad company.
Q. Those fences standing when you left?
A. Yes, sir.

Q. Your father's possession never extended westward of the fence you speak of?

A. O, yes; I had that fenced up myself as a pasture. We used it—cut wood off of there—cut a thousand or twelve hundred cords or something like that, of cottonwood on the bar there, and afterwards fenced it up for pasture.

Q. Where you cut the timber?

A. Yes, sir.

Q. Where did you put the western fence?

A. A little back from the river bank.

Q. Running along the river bank?

A. Yes, sir.

Q. Your possession never extended westward of that fence?

A. Extended to the river; didn't have it fenced plumb to the river.

Q. Had a fence running along the river bank parallel with the stream, I understand?

A. Yes, sir; part of the way; then up one end where it was washing off we let the fence run out to the edge; caving off one panel after the other; had to keep it shut up.

Q. The possession of your father always extended to that
129 fence and was bounded by it?

A. To the river bank, as far as I know.

Q. He made no use of the river bank westward of the fence?

A. We used to take our wood from there.

Q. Piled your wood eastwardly of the fence within the enclosure?

A. Yes, sir.

Q. Never piled any wood outside of the enclosure westward of the fence, did you?

A. No, sir.

Q. You maintained the fence there as long as you lived there?

A. Well, the greatest part of the time I did.

Q. After you left there you have no knowledge of the matter?

A. No, sir.

Q. Now, this loss that the property sustained, that you have been speaking of this morning, by the action of the river occurred during the time that your father was the owner of the premises?

A. Yes, sir.

Q. You don't profess to have any knowledge of any loss of property occurring after that time by the action of the river?

A. No, sir.

Q. So that, so far as your testimony is concerned, Mr. Rutz, the plaintiff here, has all the property he bought from your father that was in existence at that time—at the time of the sale by your father?

A. Well, I don't know that he has.

Q. Of course you don't know anything about it, as I understand.

A. I have been there since.

Q. Your testimony this morning was with reference to the action of the river on the property during your father's ownership of it?

A. I have been on the ground since that, and the old farm where I used to live is pretty near all gone.

Q. I speak of your testimony this morning, when you were talking of seeing the action of the water—saw the land caving in and all that happened during the time you lived there and when your father owned the premises.

A. Yes, sir.

130 Q. As to what has happened since that time you don't profess to have any personal knowledge, do you?

A. No more than I can see what the result is since then—I can see it is gone and is no longer there.

Q. But you didn't see it go?

A. No.

Q. Didn't see the water washing it away?

A. No, sir.

Q. All the testimony you have given here was directed to the time your father owned the property?

A. Yes, sir; and the time I was living there. I lived there some time after he sold it—under a lease from Rutz—sort of agreement father had that I was to remain there; had some wheat put in.

Q. How long did you remain there?

A. Remained a year under the ownership of Rutz.

Q. He bought in what year?

A. In 1873.

Q. What time of year?

A. Well, it was along in the fall of the year, I think.

Q. You remained there till the succeeding fall?

A. Yes, sir.

Q. Living on the property?

A. Yes, sir.

Q. Now, I understand you to say that when you first knew Arsenal Island it was about opposite the arsenal in the city of St. Louis?

A. About the lower end of the arsenal in 1861.

Q. I am speaking of when you first knew it?

A. It was about opposite the end of it.

Q. What year?

A. I have known Arsenal Island ever since I have been in Carondelet—after the cholera of 1849.

Q. Born in 1837, tell me what year you first saw Arsenal Island.

A. Saw Arsenal Island when we were boys in Carondelet—used to go up on the island—go on the lower part of it and watch for ducks; would have a gun and go to shoot ducks.

Q. What year was that?

A. In 1849 or 1850.

Q. When you were twelve years of age?

A. Yes, sir.

Q. And at that time Arsenal Island was opposite the arsenal in the city of St. Louis?

A. Yes, sir; away up the river—called it then Quarantine Island.

131 Q. In 1873 and 1874, when you lived on the property your father had owned, Arsenal Island was opposite that property—it had moved down the Mississippi river, had it?

A. Got down towards it—not exactly opposite it—lower end of it.

Q. The lower end of it was in front of your father's property?

A. Yes, sir; getting down there.

Q. That was in 1873 or 1874. So that from 1849 and 1850 to 1873 and 1874, a period of twenty three or four years, the island had moved down from opposite the arsenal in the city of St. Louis to opposite the property your father owned in the Prairie du Pont common fields in the State of Illinois?

A. Yes, sir; pretty near three miles, I should judge.

Q. A distance of about three miles, you say?

A. Yes, sir.

Q. Moved that distance in a period of twenty-odd years?

A. Yes, sir.

Q. That movement had been caused by the head of the island washing away and accretions attaching to the foot of it?

A. Yes, sir; but I think most of the accretions came out of Cahokia bend.

Q. Attached to the foot of the island?

A. Yes, sir.

Q. The head of the island washed away?

A. Yes, sir.

Q. About how many acres of ground were there in Arsenal Island when you knew it in 1849 and 1850?

A. It was a large place—couldn't say.

Q. Three or four hundred acres?

A. Yes, sir. I guess it was.

Q. When the island had reached a point opposite your father's property in 1873 and 1874 was it still three or four hundred acres?

A. No, sir.

Q. How much, then?

A. Don't think there was much over a hundred acres then.

Q. It had decreased in size during that period?

A. Yes, sir.

Q. When you first knew Arsenal Island the steamboats navigated between the island and the Illinois shore?

A. Yes, sir; principally ran on that side.

132 Q. That was the channel of the river—east of Arsenal Island?

A. Yes, sir.

Q. And that continued to be the fact down to 1872 or 1873, didn't it, as long as you lived in Illinois?

A. I think it was along in 1870, when the boats commenced to run on the west side again.

Q. You mean the Missouri side?

A. Yes, sir.

Q. In what year did the boats commence going on the Missouri side of the island?

A. I think in 1870.

Q. I understand you to say to-day the water is flowing between

Arsenal Island and the Illinois shore over the tops of the dyke and dam?

A. Yes, sir.

Q. The river is very high?

A. Yes, sir.

Q. At the stage of water existing to-day the Mississippi is flowing between Arsenal Island and the Illinois shore?

A. Yes, sir.

Q. But the construction of the dyke and dam by the United States Government put an end to navigation between Arsenal Island and the Illinois shore in that channel of the river, didn't it?

A. Yes, sir.

Q. And permanently located the channel between Arsenal Island and the Missouri shore?

A. Yes, sir.

Q. If the dyke and dam had not been constructed there is no reason why the channel of the river would not have been navigable up to the present time between Arsenal Island and the Illinois shore?

A. Well, I don't know; there is a big bar forms there in Cahokia—in front of Cahokia—coming down finally about that point. That point is getting filled up anyway.

Q. Where is Cahokia with reference to your father's property—north or south?

A. Two miles or two and a half north of us.

Q. Your notion is that possibly a sand-bar two miles north might have prevented navigation?

A. No; the bar was right close down before I left there.

Q. All I want is your testimony. Your notion is that a sand-
133 bar forming from Cahokia to the north in front of your father's property might have prevented navigation even if the United States had not connected the island with the shore by a dyke?

A. Yes; this bar now connects when the water is low.

Q. Have not the dyke and dam had something to do with the formation of the bar?

A. Of course it has accelerated and helped it.

Q. The dam and dyke have obstructed the motion of the water between Arsenal Island and the Illinois shore?

A. Yes, sir.

Q. And the result of that is to make still water where a sand-bar is usually formed, is it not?

A. Yes, sir.

Q. But now let us suppose that the United States had not built any structure leading from Arsenal Island to the Illinois shore, is it not likely that the water would have continued to flow between the island and the Illinois shore?

Objection to these speculations.

A. There is plenty of water there now.

Q. I understand that, but this is a season of high water, as you have told us. What business have you been engaged in?

A. Now, or when I was living on the land?

Q. All your life—what has been your business?

A. Well, I have worked a good deal in the brick-yard and at the carpenter's trade, and then I have been working as a farmer when I lived on the farm, and now I am engaged in the dry goods and notions business.

Q. Never been engaged in navigating the Mississippi river?

A. No more than with a skiff. Used to pass all times of day and night across the river, going from my house to father's house whenever they would send for me.

Q. Never followed the business of steamboating?

A. No; but I have lived along the river ever since 1849; been what you might call an old river rat along the river all the time.

Q. You stated this morning that the city of St. Louis built
134 some dykes on the Missouri side that, in your judgment, threw the river over on the Illinois shore between that and Arsenal Island?

A. Yes, sir; where the saw-mill used to be years ago.

Q. The effect of the dykes on the Missouri shore was to throw the current of the river around the head of the dyke to hug the Missouri shore?

A. The current shot right across the other side and struck in that point. There's where it went (pointing to the east side of the river and the western end of the Rutz surveys, as represented on Exhibit B).

Q. That's your judgment?

A. I know it is a fact.

Q. From what you saw?

A. Yes, sir.

Q. You say it didn't run around the head of the Missouri dyke and hug the shore?

A. Didn't go around the head of that one.

Q. What one?

A. That upper dyke at the saw-mill.

Q. That is what is known as the Bryan-street dyke, isn't it?

A. Don't know; don't know the name of the street. The city got beat and tried to pull it out.

Q. That has been removed?

—. Yes, sir; part of it.

Q. Don't you know that when that was in, the current ran around the head of it and hugged the Missouri shore so that boats would swing around with it?

A. I saw a propeller running around one day turn over on its side.

Q. Where?

A. Right at the edge of the dyke.

Q. But I am speaking—out in the river?

A. That was several blocks out in the river.

Q. After it struck the Missouri shore?

A. It was about the middle of the river between the Missouri shore and the island.

Q. Boat didn't go round between the island and the Illinois shore; went between the Missouri shore and the island?

A. Yes, sir.

Q. Then your statement that it threw the water over on the Illinois shore is wrong, isn't it?

A. No, it isn't.

Q. Current passed down between the island and the Missouri shore?

A. Water on both sides.

Q. Navigable water?

A. Some went one side and some on the other.

135 Q. Where did the bulk?

A. Illinois side.

Q. What year was that?

A. That was along in 1866 and 1867 and before that.

Redirect by Mr. EDSALL:

Q. Speaking about your possession on the river bank there, as I understand, when you built a fence, that wasn't right on the water's edge, but a little back?

A. A little back from it.

Q. It would stay there until the bank got so near it was liable to wash in?

A. Yes, sir.

Q. Sometimes did wash in; and you say you piled your wood there from year to year on the river bank?

A. Yes, sir.

Q. What was it there for?

A. To boat it across.

Q. Then you used the land clear to the water for the purpose of getting your wood away, didn't you?

A. Yes, sir.

Q. You have stated that you remained there on that land nearly a year after your father conveyed to Rutz?

A. Yes, sir.

Q. Remained there under Rutz by an arrangement?

A. Yes, sir.

Q. Did you pay Rutz anything?

A. Well, it was a hundred dollars, I believe.

Q. You had a crop of wheat, I believe, on the land when you sold?

A. Yes, sir.

Q. And the understanding was that you were to stay and get that crop off?

A. Yes, sir.

Q. Who has had possession of the land since it was sold and you left it?

A. Mr. Rutz and his tenants, so far as I know.

Q. You said the lower end of this island or sand-bar—or whatever it may be called—got opposite your father's property in what year—down the upper end of it?

A. Got down there; I don't know—1872 and 1873; it was kind of this way from us (pointing in a line diagonally up the river from the front of the Rutz surveys, as represented on Exhibit B); sort of quartering across the river.

136 Q. What first appeared there in front of the surveys?

A. Well, where the lower end of the island was would be a sort of flat—bar.

Q. Bar for what length?

A. Well, it was a considerable length; after a rise that way it would be sometimes three or four blocks long; when the river would get down it would grow up in willows, and the next rise would fetch it up higher.

A. And after that a new bar would form below?

A. Yes; kept coming down that way.

Q. And it would come down how much in a year or flood?

A. I guess it was all of a quarter of a mile.

Q. You state that the water now being high, there is water between what would be called Arsenal Island or the dry land in front of these surveys and what was the river bank in '84?

A. Yes, sir.

Q. How does the height of water now compare with the height of an ordinary stage of water in the river?

A. Well, it is a good deal higher. I should say it was anyway twelve or fifteen feet of a difference.

Q. At an ordinary stage of water in the river how would the land be in front?

A. It would be dry; dry when we went there in October of that year. I think we walked there.

Q. This deed refers to a piece conveyed to Quigley, and also a right of way to the American Bottom Improvement Board, and also to the American Bottom Lime and Coal Company. Do you know where those were situated?

A. Yes, sir.

Q. You may state.

A. Well, this American Bottom Board of Improvement bought fifty feet just south of the north line of 149.

Q. From what point?

A. From the intersection—about a quarter of a mile back of where I used to live.

Q. Did any of this land excepted in the deed extend to the river—the Quigley piece or these rights of way?

A. No, sir; all back from the river, and that forty acres
137 Quigley bought just between the Columbia road, the St. Louis road, and Prairie du Pont.

Q. How far back from the river was the Quigley land?

A. Well, that, I guess, is up about a mile and a half back—about half way.

Q. You say no one of these excepted pieces came out to the river?

A. No; they were all back from the river.

Cross-examination by Mr. BELL:

Q. You say the river is about twelve or fifteen feet above the ordinary stage?

A. Seems to me so.

Q. The ordinary stage at what time of year?

A. Fall.

Q. It isn't above the ordinary stage of the river at this time of year, is it?

A. No; it is a little over the ordinary stage now—looks to me like high water.

Q. Don't we always have high water in June and July—isn't that the season?

A. That's the season, but some years are higher than others.

Q. When you speak of the ordinary stage of the river at St. Louis, in order to give the matter any meaning you must specify what time of year you refer to, mustn't you?

A. Yes, sir.

Q. The ordinary stage of the river in June is one thing, and it is another in November?

A. Yes, sir.

Mr. EDSALL: I referred to the average of the year.

Q. Isn't it a fact that the difference between high and low water is thirty or forty feet?

A. Along about that.

Q. The ordinary stage at one season is one thing, and at another another, and the stage of water, comparatively speaking, is a high stage of water prevailing at this season of the year—may be a few feet higher, but high water ordinarily prevails in June and July each year, doesn't it?

A. Yes; to a greater or less extent, but it seems to me a good deal higher this year.

Q. You don't mean to say it is fifteen feet higher than the ordinary stage at this time of the year?

A. No.

Q. You mean to say it is fifteen feet higher than it is in the ordinary stage of low water?

A. Yes, sir.

138 Q. This possession your father held of these premises you say extended to the water's edge?

A. Yes, sir.

Q. Never claimed to exercise any possession beyond the water's edge of the Mississippi?

A. No; not beyond the water's edge.

Redirect by Mr. EDSALL:

Q. He has asked if your father ever claimed any possession beyond the water's edge. Any question ever raised as to whether his fee extended beyond the edge of the river where it ended?

A. No, sir.

Q. He never actually used any more than the dry land?
A. No more than he used the front there for a landing—wood landing.
Q. To have the boats come up there and take his wood?
A. Yes, sir.

d. Testimony of G. F. Hilgard.

G. F. HILGARD sworn.

Direct examination by Mr. EDSALL:

Q. Where do you reside?
A. I reside in Belleville, Illinois.
Q. That's in St. Clair county?
A. Yes, sir.
Q. How long have you resided there?
A. About fifty years, more or less.
Q. Were you acquainted with William L. Deneen in his lifetime?
A. Very well.
Q. What office did he hold, if any, in the county while you knew him?
A. He was deputy county surveyor and afterwards county surveyor.
Q. Who was county surveyor of that county in the year 1850?
A. Mr. Deneen.
Q. What office have you held in that county since that time?
A. The office of county surveyor.
Q. Who is the present county surveyor of that county?
A. Mr. Crowner.
Q. Are you his deputy?
A. No, sir.

Q. While you were county surveyor of St. Clair county,
139 state whether there came into your possession a record book of the surveys of your predecessor, Deneen.

A. Yes, sir.
Q. Got the book there with you?
A. This is an office record of Deneen; Deneen has recorded here a large amount of his surveys.
Q. That book contains a record of Deneen's surveys?
A. Not all of them, but a good many of them.
Q. Belongs in the county surveyor's office?
A. Yes, sir.
Q. You are familiar with that book, are you?
A. Yes, sir.
Q. It is one you have used as county surveyor?
A. Yes, sir.
Q. Any record in it of these surveys 149 to 156 in Prairie Du Pont common fields?
A. Yes, sir.

Q. Will you please turn to it? (Witness complies.) The book is paged on pages 56 and 57?

A. 56, 57, and 58, I guess, are the pages that contain the record.

Q. We will offer this book in evidence. Of course, the original book cannot be left here, but we have a certified copy that we can use.

The COURT: Certified copy of the entire book or only that portion?

Q. That which relates to these surveys—these pages.

Mr. BELL: What is the purpose of offering this book?

Q. We didn't know but what you would want to see the book.

Cross-examination by Mr. BELL:

Q. You know the handwriting in this book?

A. Yes, sir.

Q. You say this belongs——

A. The official records of St. Clair county—surveyor's office.

Q. How did you get possession of it?

A. From the county surveyor.

Q. When?

A. Yesterday.

Q. You are not the county surveyor, I understand?

A. No, sir.

140 Q. Nor a deputy?

A. No, sir.

Q. You haven't official custody of this book?

A. Not official custody. I have used it, though.

Q. Borrowed it from the office yesterday and brought it up here, did you?

A. Yes, sir.

Q. I don't think the book is competent.

The COURT: I understood him to state that he recognized it as an office book. You were in office once yourself?

A. Yes, sir; it was in my custody seventeen years.

Q. Don't know that I care anything about it.

Objection withdrawn.

The COURT: You may offer your certified copy.

Redirect by Mr. EDSALL:

We will now offer in evidence a certified copy which we claim to be the same paper that was used a year ago, marked "Plaintiff's Exhibit 'A.'"

And said "Exhibit A" (being a certified copy of Deneen's survey of said lands made in 1850) was according- received in evidence, a copy of which is to be hereto attached by the clerk as a part of this bill of exceptions.

Q. I will now call your attention to the large map before you, marked on the back "Plaintiff's Exhibit 'B'" and on the front thereof "a map showing the location of lands involved in the suit

of Rutz *versus* Seeger and others." Who made this large map marked "Plaintiff's Exhibit 'B'"?

A. I did.

Q. From what sources did you derive the information from which you made the map?

A. First the original field-notes. The map was made by the original field-notes, using some of my surveys made heretofore on the river bank.

Q. I will call your attention to the line on the map shaded yellow, along which is written in one place "old river bank, 1814," and in another, further north, "old surveyed bank of 1814." Where did you get that?

A. That line was run by the original field-notes.

Q. Of the United States surveys?

A. Yes, sir; by the Government surveyors in 1814—referring to the field-notes.

141 Q. I call your attention to a line on the opposite side of the river marked "bank of the river as surveyed by U. S." in one place and in another "bank of the river surveyed by U. S.," marked that way all the way. From what source did you get the data or information on that?

A. From the office of the surveyor in St. Louis—the city engineer's office. Ran the line according to the field-notes—reduced it according to their map.

Q. Got and used the field-notes, did you?

A. Got the field-notes. Didn't run it here (pointing to the part of the line north of the U. S. arsenal, as represented on Exhibit B)—run it up here (pointing to the part of the line opposite the Rutz land, as represented on Exhibit B).

Q. Opposite this land you run it?

A. Yes, sir.

Q. There is a line marked on this map—this line that has those little points on it—across which is written river bank, 1850, by Deneen. From what source did you get the data by which you traced that line?

A. This book here was referred to. That survey was made in 1850.

Q. Represented on this certified copy marked Plaintiff's Exhibit "A"?

A. Yes, sir. This is the river bank surveyed from 149 to 156, inclusive.

Q. On this Plaintiff's Exhibit "B" there is a line marked survey of river bank, 1873. From what source did you get the information by which you traced that line?

A. Ran that myself.

Q. When did you run that line?

A. In July, 1873.

Q. Did that indicate the bank at that time?

A. Yes, sir.

Q. There is another line further east, indicated by the words river bank, 1884. From what source did you trace that?

A. That's the river bank as it stood in 1884, as surveyed by myself.

Q. When you say the river bank was there what do you mean?

A. Well, it was just on the edge—ran right along the edge.

Q. In 1884 there was dry land out pretty near all the way?

A. No; not then.

Q. What time in the year did you make that survey?

A. I couldn't tell exactly.

142 Q. When did you first find dry land in front of these surveys 149 to 156?

A. In the spring of 1886.

Q. There is a line indicated on this Exhibit "B" as the "State line, 1818," in one place; "boundary line, as near as can be ascertained, between the States of Illinois and Missouri," in another. How did you ascertain that line?

A. Well, this is a middle line between the two surveys of the bank of the river as surveyed by the Government; it is a line midway between the two river shores as they stood in 1814.

Mr. BELL: According to the field-notes?

A. 1814; that's the way it is marked.

Q. Did you examine the old field notes to find out where those were?

—. Yes, sir.

Q. Made these from the field-notes?

A. All taken from the original field-notes; ran this line over the island here.

Q. When did you first become acquainted with that body of land called Arsenal Island?

A. About 1869.

Q. Where was that situated with respect to these surveys 149 to 156 in 1869?

A. Well, I haven't noted it very plain; only know from my own observation it was further north.

Q. Had it got down opposite these surveys at all in 1869?

A. I couldn't remember; but there were sand-bars I noticed there.

Q. Do you know how far the sand-bars had gone south in 1869? Did you have any particular reason for examining?

A. No, sir.

Q. Didn't live right on the bank?

A. No.

Q. On this Exhibit "B" there is an island here, or what appears to be an island, which is shaded red, upon which is written the words Quarantine Island, also called Arsenal Island, as surveyed in 1853. From what source did you get the information with which you made that drawing on this map?

A. Well, that was surveyed in that year by the United States Government—in 1853—and that is the first survey on record, so far as I know.

143 Q. Did you refer to the notes of that survey?

A. That is platted according to the United States field-notes.

Q. You referred to them?

A. Yes, sir.

Q. I notice part of this tract of land shaded red; there is an interior part shaded green, upon which is written or printed in green letters "Survey number 411 of St. Louis lands—school lands—Arsenal Island as surveyed in 1863;" this is shaded green and the letters are printed in green. From what source did you get the information by which you traced that on this map?

A. Also platted according to the field-notes.

Q. Then in 1863 the so-called Arsenal Island had not come down as far as these surveys?

A. No, sir; that was the location of the so-called Arsenal Island in 1863 according to the official survey made by the United States Government.

Q. I find in one place on the map, United States arsenal, and, at different places, dykes; state whether the map is to be treated as correct with regard to those indications.

A. Yes, sir; as far as I could make them by surveys.

Q. On the eastern side there is a line—a shaded line—below which the word "dyke" is written, extending from the survey 146 over to the so-called Arsenal Island. Does that represent the actual location of that dyke?

A. The actual location of the dyke as built there by the United States Government.

Q. Do you remember about the year they built that dyke?

A. I think in 1877 or 1878. Won't be exactly positive; but I think 1878.

Q. Above that line marked dyke is another dotted line with dots on both sides of it, along which the word "dam" is written. Know when that was made?

A. What I call the dam there was a set of piles driven in the river and sand, etc.

Q. Remember when that was put there?

A. Couldn't exactly say; but I think it was a year or two afterwards.

144 Mr. BELL: By whom?

A. I think by the United States—one portion. I saw them working it on here. I think done by the United States Government, because they always control that sort of building.

Q. Did you notice after you came to Arsenal Island the manner in which the bars would form below it and the land on the south of it?

A. Well, the current, always striking the north end of the island, washed away the dirt, and especially after there were dykes built on the Missouri side, which made a very strong current towards the head of the island and caused the island to wash away, and then the rubbish, and so forth, settled on the south side.

Q. How long a bar would form in high water?

A. I think about a quarter of a mile at one time; later years more than a mile below in all.

Q. While it was forming down before these surveys, 149 to 156, about how long a bar would form in one flood of high water?

A. According to my observation, I think it was a quarter of a quarter of a mile, about; can't say, you know; depends on the stage of the water. When the water is low the bar is longer and when the water is higher the bar gets shorter. I noticed one year a sand-bar to the south about a quarter of a mile.

Q. In one year?

A. Yes, sir.

Q. How long would be the duration of those floods?

A. Sometimes a week and sometimes two weeks.

Q. Are you acquainted with the character of the shore on the west side of the Mississippi river—the Missouri side, immediately opposite these surveys, 149 to 156?

A. Yes, sir.

Q. State of what it is composed.

A. It is rock.

Q. Since you have been acquainted with the river has there ever been any change in that shore line?

A. Not materially, except where the dykes were made.

Q. Is there very much change in that bank down opposite these surveys?

A. Very little.

Q. Since the survey of 1818?

A. Very little.

145 Q. How much?

A. I couldn't say. I was there in Missouri in 1854 and I was over there in 1873 and in 1884, and, I think, according to what I saw, it was about the same line. Of course, a rock breaks off—can't say exactly whether it is the same line or not, but no material difference.

Q. I understand you to say the western shore opposite these lands has remained substantially the same as you knew it and since the surveys of 1818?

A. Yes, sir.

Q. You spoke about these dykes on the western side of the river turning the flood over this way. State what you observed about the current of the river—how it was affected by those dykes.

A. Well, I noticed when this Bryan-street dyke was built it was throwing the water over this way and about that time this land commenced washing away.

Q. About what year was that?

A. Well, I couldn't exactly tell what year that was—1873 or around that way—maybe 1872.

Q. Do you know when this dyke was built?

A. No, sir; I don't know exactly.

Q. You could see that the effect of it was to turn the water over to the Illinois side?

A. Yes, sir; passed there once and saw a strong current of water over this way—could see the action of the water on Mr. Rutz's land, because it commenced washing away very fast—washed away thirty-

seven acres and sixty-five one-hundredths from 1873 to 1884, by actual measurement.

Q. That's the quantity of land between those surveys of 1873 and 1884?

A. Yes, sir.

Q. When did you first survey the land?

A. In 1873.

Q. How much it washed away from that you only know from what you yourself found?

A. Yes, sir.

Q. The land in 1863 extended nearly half a mile west of this line of 1873?

The COURT: When was that Bryan-street dyke built?

A. 1873 or 1872.

The COURT: The lower one when?

A. I don't know.

Q. There are other witnesses who know more about this 146 than he does.

A. Taking the amount of land in 1850 up to the line in 1884 about a hundred acres have washed away.

Q. Between the line as it existed according to Deneen's survey in 1850 and the line in 1884 over a hundred acres have gone off these surveys?

A. Yes, sir; over about a hundred acres.

Q. What is the distance between the old surveyed bank of the river, as indicated on this map of 1814, and the survey made by Deneen in 1850, on the north line of survey 149?

A. Thirteen chains and five links, by actual measurement.

Q. That indicates, then, that the land extended westward thirteen chains and five links further than it did in 1814?

A. Land was making, and then it washed off.

Q. On the south side of 156 what is the distance between the line marked old survey of river bank, 1814, and the line marked river bank, 1850, by Deneen?

A. Sixteen chains and fifty links.

Q. At the south end?

A. By actual survey.

Q. Then in 1850 the dry lands of these surveys extended and covered a part of what is on this map indicated by lines as being the so-called Arsenal Island, is it not?

A. Yes, sir; covered part of that in 1850.

Q. If in 1863 the dry land extended over a half a mile west of the dry land in 1873, then how much of this Arsenal Island would be included in the dry land at that time?

Mr. BELL: But Arsenal Island wasn't there at that time.

Q. We are talking about the land.

A. I don't understand.

Mr. HALBERT: The map shows that.

Q. This map appears to be drawn on what scale?

A. Fifteen chains to the inch.

Q. Fifteen chains of land represented by one inch of the map?

A. Yes, sir; just as close as it could be drawn on paper.

Q. In the making of these surveys did you find the old cor-
147 ners as indicated by the surveys of the Prairie Du Pont common fields field-notes?

A. On the south side of this land in question, on the line between 156 and 157, I found the old mulberry post set by William L. Deneen in the original corner.

Mr. BELL: You were asked about the original survey in 1814.

A. That's it.

Mr. BELL: Did he make that?

A. He found the original corner and recorded it, and I found Mr. Deneen's corner. From that I ran the river bank.

Q. In 1873 the water had not washed that point?

A. No, sir.

Q. Could you find that again from surveys within your knowledge?

A. Yes, sir. In 1873 I found that same corner. That mulberry post was covered up by three feet, and I found the witness tree.

Q. You have indicated that on the map?

A. The old mulberry post found on the river bank, set by William L. Deneen in 1850.

Q. According to the field-notes in evidence here?

A. A cottonwood traced by Mr. Deneen (witness here reading field-notes description, as noted on Exhibit B).

Q. Then, as I understand, the field-notes of these surveys of the Prairie Du Pont common fields correspond with the field-notes of this line marked river bank, 1814—represent the same line?

A. Yes, sir; as made by the Government surveyor.

Q. In tracing out Deneen's survey of the made land between 1814 and 1850, how did you run the line across that newly-made land as compared to the side lines of the old surveys?

A. When Mr. Deneen surveyed in 1850 he ran the whole line to the river—found the old corners—and from there ran out thirteen chains and five links to the bank of the river as it was then.

Q. Did he go on a straight line or deflect south?

A. Extended the line; ran and found the old Government
148 corner and then extended his line onto the then bank of the river. Then he stopped and said thirteen chains and five links to the old river bank.

Q. Have you done other surveys there?

A. Yes, sir; I surveyed all along the river—along the whole coast line.

Q. State, if you know, how it is they have occupied the new-made land in front of these surveys when there was land there; whether they extended the side lines out in a straight line or turned them at right angles to the bank or thread of the stream.

A. The custom was always to extend the lines in the same course.

Q. How did the owners actually occupy?

A. They occupied the land by continuing the same lines.

Q. Have ever since you have known them?
A. Yes, sir.

Mr. HALBERT: We offer to give this plat or map (Plaintiff's "Exhibit B") in evidence in connection with the statements of the witness.

Mr. BELL: No objection.

And said plat, "Exhibit B," was produced and given in evidence, a copy of which is to be hereto attached by the clerk as a part of this bill of exceptions.

Cross-examination by Mr. BELL:

Q. In what year was Rector's survey made?
A. 1814.
Q. That was the first survey made by the United States Government of the Prairie Du Pont common fields?
A. Yes, sir.
Q. It was under that survey that title to the property in those common fields was confirmed to the parties claiming under the original grantees?
A. Yes, sir; so far as I know; a kind of right of possession, and the United States confirmed their claims.
Q. They were confirmed according to Rector's survey in 1814?
A. Yes, sir.
Q. The common fields extended from the bluff on the Illinois side of the river?
A. Yes, sir.
Q. A distance of about three miles?
A. Yes, sir.
Q. They were in narrow strips of ground, were they not?
A. Yes, sir.
Q. Side by side, having three miles length and an arpent in width?
A. Different widths.
149 Q. East and west?
A. Not exactly—a little northwest.
Q. Same general direction. Now, these common-field lots commenced at the foot of the bluff, didn't they?
A. Yes, sir.
Q. Did they comprise what is known as bottom land?
A. Yes, sir.
Q. And the next survey that was made, following after the United States survey in 1814, was the survey made by Mr. Deneen in 1850?
A. Mr. Deneen surveyed that in 1850.
Q. Well, the first survey made after Rector's survey in 1814 was Deneen's in 1850?
A. Well, I wouldn't say exactly the first, but the first on record.
Q. It is the first in this case, anyway?
A. Yes, sir.
Q. Now, on Deneen's survey being made, it was ascertained that

from 1814 to 1850 these common fields had gained a considerable area by the Mississippi river receding in a westerly direction?

A. Yes, sir.

Q. About how many acres were gained by the property held by Mr. Blumenthal?

A. About forty acres.

Q. So that the tract of ground that was acquired by Blumenthal and afterwards conveyed by him to Rutz and others between 1814 and 1850 gained forty acres?

A. Yes, sir; about.

Q. And that gain was effected by the Mississippi river receding westward on the front of the property?

A. Yes, sir.

Q. Afterwards the action of the river changed, so that the property lost about a hundred acres?

Objection. He hasn't said that.

Q. Allow me to talk to Mr. Hilgard. Subsequently to 1850 these common fields in the Prairie Du Pont lost about a hundred acres of land?

A. Up to the present time.

Q. But in that hundred acres of ground was included the forty acres they had gained between 1814 and 1850?

A. Yes, sir.

150 Q. So that they not only lost all they had gained, but lost also an additional acreage of about sixty acres?

A. Yes, sir.

Q. And that was occasioned by the action of the Mississippi river washing off the ground in front of these surveys, was it not?

Objection: Counsel makes a statement like an argument and gets the witness to say yes, sir.

The COURT: The witness is intelligent and can take care of himself, and it is cross-examination, in which wide latitude is allowed.

Objection overruled.

Q. Did you actually run out on the earth's surface the line surveyed by Rector in 1814?

A. Yes, sir.

Q. Did you actually run out on the earth's surface the line surveyed by Deneen in 1850?

A. No, sir.

Q. Why not?

A. Because it was in the water.

Q. Wasn't on the earth's surface when you made your survey?

A. No, sir; but as I had the original line of Rector all I had to do was to take the other; had the number of chains and links.

Q. I understand when you surveyed Rector's line on the surface his line was on dry ground?

A. Yes, sir.

Q. So you had no difficulty; but when you came to survey De-

neen's his line was covered by the navigable waters of the Mississippi?

A. Yes, sir.

Q. What time of year did you make that survey?

A. The first survey I ran; made the survey in 1869.

Q. Was that Rector's line?

A. Yes, sir; afterwards made one in 1873.

Q. When was it that you attempted, if you ever did attempt, to run Deneen's line on the earth's surface and found it was covered by navigable water?

A. Couldn't run that because it was under water in 1869?

Q. Never was a time you could run Deneen's line?

A. Yes, sir; I could have run it on the ice.

Q. I mean it was covered by water at all times?

A. No; not all times; dry in 1886; could have run it then.

151 Q. Why didn't you?

A. If I have one side I don't need to run the other side.

Q. Thought it was just as well to run it on this map?

A. Certainly, if you have two lines parallel with each other.

Q. You said you ran out a line in 1884?

A. Yes, sir.

Q. Is that marked?

A. Yes, sir (exhibiting).

Q. Now, when you ran that line in 1884 along the river bank was the water of the Mississippi right in front of you?

A. Yes, sir.

Q. Your line represents the water's edge?

A. Represents the bank.

Q. Practically the water's edge?

A. Couldn't say that, because the water was twenty or twenty-five feet below me.

Q. Had to keep back about that distance in order to survey—you surveyed the break in the ground?

A. Don't say water—says bank.

Q. The bank was how high above the water?

A. Twenty feet to twenty-five.

Redirect by Mr. EDSALL:

Q. This line marked Deneen survey, you took his field-notes and from that traced it?

A. Traced it on paper; no use to survey it at all. If you have one line you can always compute the other exactly; it was a true representation.

The plaintiff read in evidence the certain report printed on page 167 of said volume II of American State Papers, public lands, printed, under authority of U. S. Senate, by Duff Green in 1834, as follows:

c. Report from Vol. 2 American State Papers.

Report on the commons and common-field tract and town lots of the villages of Cahokia and Prairie Dupont.

"A tract of four leagues of land square," as expressed in the grant on the 22d day of June, 1722, was granted to the missionaries of Cahokia and Tamarois, who seem to have been under the control of the bishop of Quebec, by Pierre Duguet de Boisbriant, first lieutenant of the King of France for the province of Louisiana and
152 commandant in the Illinois, and Marc Antoine de la Loire Des Ursins, principal commissary of the royal company of the Indies (see United States Register Book of Translations, page 208), bounded on the west by the Mississippi, including the adjacent islands, beginning "a quarter of a league above the little river of Cahokia" and extending south and east for quantity.

This grant was in fee simple, and from it have emanated the titles to the lands which form the subject of this report.

On the commons.

By the fifth section of the law of Congress of 1791 it is provided that "a tract of land, including the villages of Cahokia and Prairie Dupont, and heretofore used by the inhabitants of the said villages as a common, be, and the same is hereby, appropriated to the use of the inhabitants of the said villages, respectively, as a common."

As the limits of the said commons were left by the said law undefined and could not be found described in the ancient records, it became a subject of compromise and agreement between the citizens of the said villages and the Governor of the Territory about the year 1797, and, by their consent, two tracts, containing, in the whole, five thousand four hundred acres, ordered to be laid off for this purpose were surveyed accordingly by a surveyor appointed by Governor St. Clair.

But on an examination into this business the commissioners have discovered that the said surveys have been inaccurately and improperly made; that for Cahokia, in particular, containing (instead of about four thousand acres, as it ought to have contained) about twenty thousand acres.

This circumstance and the situation of the said tracts not accommodating the inhabitants, this board have thought proper, at their request, to permit a new location to be made for each
153 of the said villages on lands more conveniently situated for them. The limits and position of that part which has been relocated will be found described in the annexed plats. We have the more readily done this as the land which the inhabitants abandon is of more value to the United States than that which they have taken.

On the common field.

This tract, as will be seen of the plat and list of claims annexed, is composed of the various grants or allotments made to the several

inhabitants of these villages, and from the first has been enclosed by a common fence. The original boundaries of this tract have been found by the present surveyor, and there seems to be no dispute between the individuals claiming here about their titles or their boundaries.

On town lots.

These are similarly situated with the common-field lands. We do, therefore, declare that the United States have no interest in the lands here reported on and affirm to the said several claimants in possession the said lands, leaving it to those who may be injured by any error which may, possibly, have been committed in the premises to pursue their remedy in a court of law.

NOTE.—As special confirmations have heretofore been made inconsistent with the descriptions in the annexed plat of Cahokia common field, we think it here necessary to remark that none of the allotments in said field extended towards the Mississippi over the rigolet or river L'Abbé (so called), and that it ought to be declared by law that any confirmations made giving a greater extension to the said settlements towards the Mississippi shall be null and void.

MICHAEL JONES.
E. BACKUS.

Commissioners' office, Kaskaskia, December 31, 1809.

154 And the plaintiff also produced in evidence the plat of the survey and field-notes as contained in said volume of American State Papers, between pages 172 and 173 thereof, and the following is a substantial copy of so much of said plat and survey referred to in said report as relates to surveys 149 to 156, inclusive, in the surveys of the common fields of Prairie du Pont:

155 *f. Plat of Surveys* 149 *to* 156, *Common Fields, Prairie Du Pont.*

"I do hereby certify that the surveys above laid down were made by me by the consent and with the aid of the citizens of Prairie Du Pont, and that many of the ancient boundaries were found and governed the surveys, and also were correctly executed by me as laid down on this plat.

"May 23rd, 1808.

"ELIAS RECTOR."

The plaintiff also read in evidence from said volume of American State Papers, from pages 173, 174, and 175 thereof, the following extracts therefrom attached to said report:

A List of Claims Lying in the Common Field and Village of Prairie du Pont.

No. of claim.	No. of arpents in front.	Original claimant.	Present claimant.	Description and remarks.
* * *	* * *	* * * *	* * * *	* * * * * * *
1180	1	Joseph Poryard	Louis Jarvais, assigned to his son Philip.	A piece of land extending from the hills to the Mississippi, joining Francois Perry on the west and Baptiste Chartran on the east.
1453	2	" "	Jean Baptiste Chartran	Extending from the hills to the Mississippi, adjoining Jarvais on one side and Germain on the other.
1454	1	" "	" " "	Extending from the hills to the Mississippi, joining on one side Gendron and Deloge on the other.
1439	2	Charles Germain	Louis Gendron	Extending from the hills to the Mississippi, joining on one side J. B. Chartran and on the other J. B. Gendron.
1098–2	1	Louis Chattel	Francois Grondine	Extending from the hills to the Mississippi, joining Pierre Martin on the west and Gabriel Marloe on the east.
1450	1	Renê Beauvet	Clement Allery	Extending from the hills to the creek, bounded on the east by F. Grondine and on the west by J. B. Chartran.
750	3	St. Ange Cabassier Bergeron and St. Aubin.	Jean F. Perry	Extending from the hills to the Mississippi, bounded on the south by Isaac Darneille and on the north by P. Jarvais.
1391	1	Jean B. Gendron	Jean B. Gendron	Extending from the hills to the Mississippi, bounded on the south by Charles Germain and on the north by La Course.

(Here follow diagrams marked pages 157 & 158.)

Here the plaintiff's case was closed.

159 Thereupon the defendants, to maintain the issues on their part, introduced the following evidence:

Defendants' Evidence.

Mr. BELL: I will offer in evidence an assignment by the United States to the St. Louis public schools of Arsenal Island, made in 1863 and 1864, as follows:

j. Assignment by U. S. to St. Louis Public Schools.

INTERIOR DEPARTMENT,
GENERAL LAND OFFICE, *August 25th*, 1864.

SIR: I have the honor to submit for your approval the selection of section 2, township 44 north, range 7 east, as per inclosed diagram, containing $9\frac{65}{100}$ acres, made by the State agent, E. Casselberry, and proposed to be reserved for school purposes under the act of 20th May, 1826, as indemnity for school lands lost in section 16, township 45 north, range 7 east, in the St. Louis district, Missouri. No objections appearing from the books of this office to the selection, it is recommended for your approval, subject to any legal rights in others existing at the date of selection.

an Very respectfully your obedient servant,
I' JOS. S. WILSON,
Acting Commissioner.

Hon. J. P. Usher, Secretary Interior.

DEPARTMENT OF THE INTERIOR,
September 8, 1864.

The selection described within is approved, subject to any valid interfering legal rights that may have existed at the date of selection.

W. T. OTTO, *Acting Secretary.*

(Here follows diagram marked p. 160.)

161 OFFICE OF THE SURVEYOR GENERAL
FOR ILLINOIS AND MISSOURI,
ST. LOUIS, *February* 10, 1863.

The above plat of an island in the Mississippi river called "Arsenal or Quarantine Island," in township 44 north of the base line, range 7 east of the fifth principal meridian, is strictly conformable to the field-notes of the survey thereof on file in this office, which have been examined and approved. The survey of the island was executed in January, 1863, by Wm. H. Cozens, deputy surveyor, under instructions dated 3d January, 1863, at the expense of the board of public schools in the city of St. Louis, as per instructions of the Commissioner of the General Land Office of the 24th November, 1862. Under the said instructions of the Commissioner of the General Land Office, part of the island designated as survey No. 411 of

St. Louis lands, and containing 109.92 acres, was this day assigned and set apart to the board of St. Louis public schools for the support of schools, in conformity with the provisions of the acts of Congress of the 13th June, 1862, and 26th May, 1824.

WM. CUDDY,
Surveyor General.

Also the following deed:

l. Deed by St. Louis Schools to the City of St. Louis, Mo.

[U. S. stamp, $33; P. S. February 8, '66.]

This deed, made and entered into this eighth day of February, eighteen hundred and sixty-six, by and between the board of president and directors of the St. Louis public schools, parties of the first part, and the city of St. Louis, party of the second part, witnesseth: That the said parties of the first part, by virtue of a certain resolution of said board adopted on the twenty-sixth day of December, 1865, and for and in consideration of the sum of thirty-three thousand dollars to them paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents remise, release, and forever quitclaim and convey unto the said party of the second part and to the successors and assigns forever of said party of the second part all the right, title, interest, estate, claim and demand of the said parties of the first part and of the inhabitants of said city of, in, and to the following-described real estate in the county of St. Louis and State of Missouri, to wit: All of the land within an island in the Mississippi river known as "Quarantine Island" and sometimes called "Arsenal Island," which said island includes all the land within United States survey number four hundred and eleven (411) of the series of St. Louis lands, containing one hundred and nine acres and ninety-two hundredths of an acre (109.92), and all the land within fractional section number two (2), in township forty-four (44) north of base line, in range seven east of the fifth principal meridian line, containing nine acres and sixty-five hundredths of an acre (9.65), and described in a document dated in the year 1864 and recorded in the recorder's office of said county in Book 295, pages 207 and 208, and executed by the
162 Commissioner of the General Land Office and by the Secretary of the Interior. The said pieces or parcels of land herein described and conveyed compose, form, and include the whole and every part of said island, and said island is bounded on every side and part thereof by the Mississippi river; to have and to hold the same unto the said city of St. Louis and to the successors and assigns forever of said city.

In testimony whereof the president of said board has hereunto set his hand and affixed the corporate seal of said board hereto; and the secretary of said board has attested the same under said corporate seal the day and year first aforesaid.

[SEAL.] FELIX COSTE, *President.* [SEAL.]

Attest: GEO. M. FICHTENKAM, *Secretary.*

STATE OF MISSOURI, } ss:
County of St. Louis, }

Be it remembered that on this ninth day of February, A. D. eighteen hundred and sixty-six, Felix Coste, president of the above-named board of president and directors of the St. Louis public schools, who is personally known to the undersigned, a notary public within and for the said county in said State, to be the same person whose name is subscribed to the foregoing instrument of writing as president of said board and as party thereto, personally appeared before me and acknowledged said instrument to be the act and deed of said board and his own act and deed as president thereof, and also acknowledged that he executed and delivered the same as president as aforesaid for the uses and purposes therein contained.

[SEAL.] In testimony whereof I have hereunto set my hand and affixed my notarial seal the day and year last aforesaid.

ADOLPH SCHENK,
Notary Public, St. Louis County.

Filed and recorded February 13, 1866.
JULIUS CONRAD, *Recorder.*

m. Testimony of James Kelly.

Captain JAMES KELLY sworn.

Direct by Mr. BELL:

Q. What is your first name?
A. James.
Q. Where do you live?
A. St. Louis.
Q. What is your business?
A. Pilot on the river.
Q. Mississippi?
A. On the Mississippi and on the Missouri.
Q. How long have you been engaged in navigating the Mississippi river?
A. Been navigating it since 1837—piloting since 1847.
163 Q. When were you first in St. Louis?
A. 1837.
Q. Continued navigating the river from 1837 down?
A. Yes, sir.
Q. Did you know an island in the Mississippi river known as Arsenal or Quarantine Island?
A. Yes, sir.
Q. When did you first know it?
A. When I first commenced piloting in 1847.
Q. Where was it, in the State of Missouri or State of Illinois?
A. State of Missouri.
Q. Where was the navigable channel of the Mississippi river with reference to said island, east or west?
A. East; on the Illinois side.

Q. Boats navigated between Arsenal Island and the Illinois shore?

A. Yes, sir.

Q. Whereabouts with reference to the arsenal in St. Louis when you first knew it?

A. The head of the island was above the arsenal when I first knew it.

Q. Where did the foot of it go?

A. Below it.

Q. In what year?

A. Went there in 1847.

Q. You saw the island continuously from 1847 down to 1860?

A. Yes, sir.

Q. Constantly engaged in navigating the river during that period?

A. Yes, sir.

Q. Passing the island on every trip and making a trip every week or two weeks, as the case might be?

A. Two weeks to three weeks.

Q. Where were you running mostly?

A. To New Orleans.

Q. Between St. Louis and New Orleans?

A. Yes, sir.

Q. Every trip coming from New Orleans to St. Louis and th other way, you necessarily passed Arsenal Island with your steamer

A. Yes, sir.

Q. All that time the navigable channel was between the island and the Illinois shore?

A. Yes, sir.

Q. And the island was unquestionably in the State of Missouri?

A. Yes, sir.

Q. Did you observe during the years that Arsenal Island
164 was changing its position in the river?

A. Yes, sir; we knew it was going down.

Q. State what occasioned that change and how it presented itself—what aspect it presented.

A. The current washed the head of the island off and settled the sediment at the foot.

Q. So the island was traveling in a southwesterly direction, as ti were?

A. Down the river.

Q. In what year did the navigable channel—in what years did it continue between the island and the Illinois shore?

A. Up to 1874.

Q. Then your statement is that from 1847 to 1874 the navigable channel of the Mississippi was between Arsenal Island and the Illinois shore?

A. Yes, sir.

Q. During this period a gradual change had been going on by the island losing ground at the head by the action of the water and gaining ground at the foot?

Objection. This is on direct examination of his own witness.

The COURT: If it is insisted upon counsel will have to conform and not put leading questions.

Objection sustained.

Q. Now, when did the change in the channel take place; in what year did boats commence to navigate the Mississippi river between Arsenal Island and the Missouri shore?

A. The first year I done it permanently was in 1874.

Q. Where is the channel to-day?

A. On the Missouri side of Arsenal Island.

Q. So your statement is that the channel changed somewhere in the neighborhood of 1874 from east of the island to west of the island. Now, during all this period of which you have spoken, from 1847 down to the change in the channel in 1874, state whether or not Arsenal Island was an island existing in the Mississippi river and surrounded by the waters of the river.

A. Yes, sir.

Q. Do you remember, Captain Kelly, of the Government
165 building a dam and a dyke extending from the Illinois shore to Arsenal Island?

A. Yes, sir.

Q. That was done by the United States Government?

A. Yes, sir.

Q. Tell the court what effect those structures had on the island and on the water that formerly flowed between the island and the Illinois shore.

A. Stopped it from running on that side in low water.

Q. How would that affect the question of the river flowing between the island and the Illinois shore—to make dry land there?

A. All the sloughs stopped up; it would fill in by sediment from high water.

Q. When you stop the current or flow of water in the Mississippi river, state to the court what effect is produced at that point in the river.

A. It fills it up, sir.

Q. How is that done?

A. By deposit of the sediment.

Q. Settling in the bed of the river?

A. Yes, sir.

Q. What is the fact as to the water of the Mississippi carrying a good deal of solid matter in the shape of sediment?

A. All Missouri floods carry more or less sediment.

Q. Now, when you build a dam or dyke across flowing water carrying sediment of that sort so as to stop the flow of water, what becomes of the sediment?

A. It deposits right there.

Q. Settles on the bottom of the river. So the effect of the construction of the dyke and dam between the Illinois shore and Arsenal Island was to cause sediment to settle in the bed of the river and to create land between the main shore and the island. Is that correct?

A. Yes, sir.

Q. Now, I will ask you this. In your judgment, if the United States Government had not built the dyke and dam extending between Arsenal Island and the Illinois shore, would the navigable channel of the river to-day be between Arsenal Island and the Illinois shore?

A. I couldn't tell, sir.

Q. Why are you unable to give an opinion on that subject?

166 A. Because the current washes one side of the island one year and another side of the island another year, and so changes from one side to another for a year or two until it is decided.

Q. It is impossible, then, on account of the shifting character of the island, to predicate?

A. I can't tell until low water comes.

Q. Still, as I understand you, your opinion is the construction of the dyke and dam did create ground between the island and the Illinois shore?

A. Undoubtedly, after it was built.

Q. And it certainly stopped navigation between the island and the Illinois shore. Do you remember when the city commenced occupying Arsenal Island?

A. Yes, sir; recollect I landed for quarantine in 1850, 1851, and 1852.

Q. All boats coming from the South to St. Louis were stopped at the island, were they?

A. Yes, sir; had to be examined there.

Q. How long was a boat required to lie at the island?

A. Till they were fumigated, if there were any sick—and dead were buried.

Q. Any health officer on the island?

A. Yes, sir; it was a health station.

The COURT: When did he say the city commenced using it for that purpose?

A. 1850, 1851, and 1852, my best recollection.

Q. Was there any other person in occupation of the island at that time other than the city of St. Louis?

A. I don't know, sir.

Q. Did you see any?

A. Don't know and don't recollect.

Q. So far as you know?

A. Don't know.

Q. There was no other than the city of St. Louis—that's all you saw?

A. All I know.

Q. Do you know anything of the island being used as a hospital and about the dead being buried there?

A. Yes, sir.

Q. What?

A. I have seen it there.

167 Q. Saw the hospital there?

A. Seen buildings—never in them.
Q. You know the dead were buried there?
A. Yes, sir.
Q. They were persons who died on the island?
A. Died on boats—brought them there—dead were buried.
Q. Know it in 1865 and 1866, after the close of the war—know anything about the island being occupied for hospital purposes then?
A. Don't recollect much about it then.
Q. Did you ever know a gentleman by the name of Seeger, who lives on the island?
A. No, sir.
Q. You have passed the island, as you have stated, during these years and saw it, did you?
A. Yes, sir.
Q. If there had been any other occupation of the island than you have mentioned you would have noticed it, wouldn't you?
A. I likely would, sir.

Cross-examination by Mr. EDSALL:

Q. I understood you to state that you ceased to navigate on the east side of the island in 1874?
A. Yes, sir.
Q. Since 1874 boats have run on the west or Missouri side of the island?
A. Yes, sir.
Q. Prior to that time they generally ran on the east side?
A. Ran all the time on the east side.
Q. You spoke about a dyke and dam built on the Illinois side. Do you remember what year those were built?
A. No, sir; no memorandum to refer to.
Q. But the navigation had ceased on the east side in 1874?
A. Yes, sir. If you will allow me to answer, boats did try to go up on that side, but had to go back because they were closing the dyke on them; don't know what year that was.
Q. In 1851 and 1852, can you state, with reference to the arsenal on the St. Louis side of the river, where the island was?
A. The head of the island was above it.
Q. Any dry land there at all now?
A. Where the head of the island was then?
168 Q. Yes, sir.
A. No, sir.
Q. You stated with regard to there being a burying ground there where the dead were buried. Isn't that all washed away since then?
A. Well, I don't know; would have to tell that by measurement.
Q. Is there any of the island left as it existed in 1863?
A. I wouldn't be able to say; would have to tell that by survey.
Q. Couldn't say from your own personal recollection whether any of the dry land that existed in 1863 exists to-day?
A. No, sir.

Q. What do you call this?

A. It is Arsenal Island by the head cutting off and forming on the foot.

Q. How much would form on the foot in one spring rise or flood?

A. A couple of hundred yards would grow up on the foot.

Q. Do you know how long a bar will form there in one flood—ever notice?

A. A couple of hundred yards—four, five, or six hundred, according to the rise.

Q. Bar varying from a couple of hundred yards to five or six hundred yards forming in one spring rise in the river?

A. Sometimes longer and sometimes shorter.

Q. That bar would extend down the river?

A. Yes, sir.

Q. In fact, must have extended over towards the Illinois side, mustn't it?

A. No, sir; straight down the river. The main current was on the Illinois side, and that got the bar straight down the river.

Q. Do you know where the bars extend to-day—how far below? You know the location of these surveys. Do you recognize this map here as indicated here—the ice-house?

A. Yes; I know where the ice-house is.

Q. When this map was made some years ago the bar extended that distance below the ice-house. Know how far it extends to-day?

A. No, sir.

Q. Does it extend a half mile below—know where Myer's mill is?

A. Yes, sir.

Q. It is this side?

A. The mill would be more in there.

169 Q. Do you know whether or not the bar extends down as far as Myer's mill?

A. No, sir; couldn't tell you.

Q. What would occur to one of those bars the first year after forming below the island?

A. If out of water long enough young willows would grow.

Q. The next year what would take place?

A. Willows would continue to grow.

Q. When the flood came wouldn't more sand settle?

A. Yes, sir: the bar would rise and willows grow.

Q. Wouldn't more follow?

A. Yes, sir; if the channel is straight down the river the bar goes down. If the bar goes across it is cut off by the current.

Q. These did form straight down?

A. Yes, sir; year after year.

Q. Whether they formed a new one every year you don't know?

A. No, sir.

Q. How long is the duration of these spring floods?

A. Two months to two and a half—about.

Q. Be booming high that length of time?
A. Yes, sir; pretty high.
Q. How far above what is called now the arsenal was the island called Arsenal Island when you first knew it—how many miles?
A. I couldn't tell you in miles—only tell you by describing that the head of the island was above the arsenal.
Q. About how far? Describe it anyhow.
A. I couldn't describe it. I know it was above the arsenal.
Q. You can tell how far?
A. I couldn't begin to give the feet.

Redirect by Mr. BELL:

Q. I forgot to ask you a question or two. What is the difference between high and low water at St. Louis?
A. Something over thirty feet.
Q. When is the usual period of high water?
A. June and July.
170 Q. When of low water?
A. September, November, and December.
Q. Did you ever observe the effect on the current by the dykes on the Missouri side—the Bryan-street dyke, for instance?
A. Yes, sir.
Q. What effect did it produce on the current?
A. The current came short around the end of the dyke right in against the Missouri shore.
Q. Did that dyke operate in any way to throw the water from the Missouri side over to the Illinois shore?
A. Don't know that it did, sir.

Cross-examination by Mr. EDSALL:

Q. What is the difference in feet usually between the stage of water at this season of the year—the first days of July—and, we'll say, September, October, or November?
A. Well, the years vary a little—a few feet—but I will give it to you as nearly as I can approximately—about thirty feet.
Q. Then you would expect the river to be all of thirty feet lower next September than it is now?
A. No; now it is only twenty-two feet above low water.
Q. You would call low water what it would usually be between September and October, and there is about twenty feet between its present height and what you expect it to be then?
A. Yes, sir.

Redirect by Mr. BELL:

Q. Take the present condition of the water. Is it exceedingly high or ordinary?
A. A good stage of water—not exceedingly high water.

n. Testimony of W. H. Cozzens.

W. H. COZENS sworn.

Direct by Mr. BELL:

Q. You live in St. Louis?
A. Yes, sir.
Q. What is your business?
A. Land surveyor and civil engineeer.
171 Q. How long have you followed that business in St. Louis?
A. Ever since the years 1836 and 1837.
Q. Know Arsenal Island?
A. Yes, sir.
Q. Ever survey it?
A. Yes, sir.
Q. What year did you first survey it?
A. About 1853.
Q. When the second time?
A. About 1863.
Q. When did you survey it the third time?
A. About 1867—1866 or 1867.
Q. Ever make a further survey?
A. Surveyed it since that, about five years ago.
Q. Where was Arsenal Island when you first know it, with reference to being in the State of Missouri or Illinois?
A. In the State of Missouri, near the western shore of the river; small space between the island and the main shore.
Q. Of Missouri?
A. Yes, sir.
Q. Near the arsenal?
A. Yes, sir; the head of it extended above the arsenal a little distance—and down below.
Q. It covered the river front on which the arsenal was located at that time?
A. Yes, sir; above and below the arsenal.
Q. From the time of your first knowledge of Arsenal Island down to the time it became attached to the Illinois shore by dykes built by the Federal Government, state whether or not it has always existed as an island in the Mississippi river.
A. Yes, sir; always existed as an island, but shifting its position from year to year, according to the different stages of the river whether high or low—formation made by abrasions of the upper or north end and the particles being carried down by the current and deposited at the lower end—down the current in the direction of the river as it was running at that time.
Q. Was the island during all these years continuing to exist as an island while so moving southwardly with the current of the river?
A. Yes, sir.

172 Q. And there never was a time, was there, when it ceased to exist as an island?

A. No, sir; always existed as an island and was in part cultivated all the time.

Q. Now, do you remember how the island has been used? What was the first use made of the island that came under your observation?

A. It was assigned by act of Congress to the board of schools for school purposes in 1853 and held by them.

Objection; not responsive to the question.

Q. What I wanted to ask you was simply the use of the island; no matter about any documents?

A. It was used for quarantine purposes for many years.

Q. What year was it used for quarantine purposes?

A. Even as far back as 1850 and 1851.

Q. Tell me in what year was the cholera in St. Louis.

A. 1849.

Q. Now, in 1850 the island, you say, was used for quarantine purposes?

A. Yes, sir.

Q. What did the city have down there—a health officer?

A. Had a building erected on the island and boats from the South were required to stop there and be examined, and if there was no sickness they were permitted to pass. If they were sick the boats were fumigated, the sick taken off and put in the hospital, and the dead buried on the island.

Q. A hospital on the island?

A. Yes, sir.

Q. Maintained by whom?

A. By the city.

Q. Dead were buried on the island?

A. Yes, sir.

Q. By whom?

A. By the city.

Q. Any other occupation of the island at that time except by the city of St. Louis?

A. None at all.

Q. What do you know about a hospital on the island in 1865 and 1866 and along down there?

A. In 1863 there was an additional building. This old building was elongated and an additional building put up by setting off a small-pox hospital—used as such for quarantine and small-pox cases.

173 Q. Now, the dead were buried there during those years?

A. All over the island.

Q. Who was in occupation of the island?

A. The city of St. Louis. Visited the island in company several times with James S. Thomas, who was mayor of St. Louis during the war.

Q. Do you know Mr. Seeger?

A. I do, sir; gentleman who cultivated the island—leased it from the city of St. Louis.

Q. Any improvements on the island?

A. Yes, sir; a house and fences and fields.

Q. He is there up to the present time, isn't he?

A. I believe he is.

Q. So that within your knowledge the city of St. Louis has been in occupation of this island from 1850 to the present time?

Objection.

The COURT: Try to avoid objection if you can.

Q. (Producing another map.) Now, will you look at this map and tell me whether it is correct?

A. That is a map executed by me—my name is attached to it—in 1883, my last survey of the island.

Mr. HALBERT: We admitted this before. No use of this detail.

A. Shows three surveys of the island were made at the respective times that I have mentioned. There was the first—all washed down—kept going down that way—forming in this direction.

Q. Will you tell me whether that map exhibits a survey of Arsenal Island made by you in the year 1853?

A. Yes, sir.

Q. How is that survey designated—by what colored line?

A. Yellow.

Q. Yellow line marks the extent of the island as surveyed in 1883 by William H. Cozens.

A. 1853.

Q. 1853. State whether that was an actual survey of this island made by you in 1853.

A. Yes, sir; an official one.

174 Q. In what capacity?

A. United States surveyor.

Q. State whether or not this also shows Arsenal Island as surveyed by you in 1863.

A. (Reading a notation to that effect on the map.)

Q. And that is indicated by a line marked as a survey of the island in 1863 by William H. Cozens?

A. Yes, sir.

Q. That survey of 1863—was that an actual survey made by you?

A. Yes, sir.

Q. On the surface of the earth?

A. Yes, sir.

Q. On this island?

A. Yes, sir.

Q. Actually by your compass and chain you ran out the configuration of this island on the earth's surface?

A. Yes, sir.

Q. And this map represents it?

A. Yes, sir.

Q. That is true with reference to the surveys of 1853 and 1863?

A. Yes, sir.

Q. Correctly delineated here—did you make a survey of Arsenal Island in 1883?

A. I did, sir.

Q. Does this map mark it as surveyed in 1883 by you?

A. In red tinted lines; yes, sir.

Mr. EDSALL: There is an 1881 survey.

Q. That is made by Mr. Joyce. We will introduce him. Now, these three surveys made by you in 1853, 1863, and 1883 are all correct and are correctly delineated on this map?

A. Yes, sir.

Q. About what year, Mr. Cozens, did Arsenal Island pass out of the State of Missouri and into the State of Illinois?

A. It was after the United States Government had built a dyke extending from near the northern part of the island over to the main shore of Illinois.

Q. What was the effect of that dyke?

A. It was to form a very heavy deposit of sand, extending away up towards St. Louis, and all these places around in here and making an extended sand-bar—an extended fill—sand-bar. The dyke made that, with this incident: The stone settled down in the soil and there was a hole made here some fifty feet in depth and
175 the water ran through and opened up a channel again, but they built across here in addition to the old dyke—this work—drove down piles.

Q. Who did?

A. The United States Government, and to strengthen that they erected another dyke right across here.

Q. Did those two structures have the effect to stop the flow of water between the island and the Illinois shore?

A. Yes, sir; joined them so that the water did not run through any more or very little percolated through. No stream—no travel on that side of the island any longer, and it became attached to the shore by these heavy deposits of sand.

Q. In your judgment, if left to natural causes and independent of the artificial structures placed in the river by the United States Government, would Arsenal Island have attached itself to the Illinois shore in front of the Prairie Du Pont common fields?

A. No, sir; because in 1876, when the United States Government undertook to erect those works, it was deep water.

Q. Where, in your judgment, would have been the navigable channel of the Mississippi river as to Arsenal Island to-day if the structure put there by the United States Government had been omitted?

A. The channel was on the east side of the island, between that and the main shore of Illinois, but the moment they erected the first dam across and dyke then the water impinged against the Missouri shore, which was a rock shore, and it impinged back again and struck the island and washed away a part of the island shore; and in order to protect their works on the island the Government had

to revet the whole western shore until they got below that point to prevent its being entirely washed away.

Q. What is the island to-day as to being stationary or otherwise?

A. Stationary to-day because the Government has made it so.

Q. You mean the United States Government?

A. Yes, sir.

176 Q. State whether or not the United States Government has located a light-house at the head of the island.

A. The light-house is erected just there (pointing), and all this shore here is revetted with rock down about here—and this shore. The head of the island was also revetted. It had begun to cut away. The head itself at first was the only part revetted and the western turn on the head of the island, but it had begun to undermine, and then they revetted it on this side also, and a sand-bar having formed against it has made it a solid body—a solid body on the eastern side of the island. The two dykes have connected it with the Illinois shore and made it a solid body of land.

Q. Did you make the survey in 1863 of the island embraced in the assignment to the public schools?

A. Yes, sir; it says conformably to the field-notes of the survey thereof, and so forth, executed by William H. Cozens in 1863.

Q. Are you that William H. Cozens?

A. Yes, sir.

Q. You were deputy United States surveyor?

A. Yes, sir.

Q. You surveyed this island in 1863?

A. Yes, sir.

Q. Your survey is correct?

A. Yes, sir.

Q. At that time the island was in the State of Missouri?

A. Yes, sir.

Cross-examination by Mr. EDSALL:

Q. You said in 1863 when you surveyed the island it was in the State of Missouri; in what State is it now, Illinois or Missouri?

A. That would be very hard to answer because it is an artificial connection.

Q. Can you state in miles approximately how far the island as it is to-day is below the island called Quarantine Island and afterwards Arsenal Island in 1853, when you first surveyed it?

A. That's the township line; there in 1853; there in 1863; it has gone down in a direct south line a half a mile; gone down in a quartering direction; southwest course.

Q. How far is the southern end of the island as it exists

177 to-day below the southern end of the island as you surveyed it in 1863?

A. Nearly a mile.

Q. How far is the island east of the point where it existed in 1853—how far is it east?

A. It isn't east, it is west.

Mr. HALBERT: How far is the present end of the island east from what it was when you surveyed it?

A. The south end of the present island with reference to the south end of the old island, the south end is west.

Q. Which lies west?

A. There—you can't force me to say west is east.

Q. That is the Missouri side, isn't it—here was the eastern point of the island in 1863?

A. No, sir; the western part of the island.

By Mr. HALBERT: Illinois east or west of Missouri?

A. Illinois lies east.

Q. Which is the end nearest the Illinois shore?

A. O, you said the Illinois shore?

Q. I want to know how far east the island is now from what it was in 1863?

A. It is west—going west all the time, because the river trends to the southwest and not to the east.

Q. How far nearer the Illinois side of the river is the southern end of the island?

A. It is nearer to the Illinois shore than it was in 1863.

Q. By what distance?

A. This is about a little over—about a third of a mile, and up here from the shore there it is a half—about three-quarters of a mile.

Q. Is any portion of the island as it existed when you surveyed it in 1863 dry land to-day?

A. When I surveyed it in 1883?

Q. No; answer my question.

A. I want to answer that question. In 1863 and 1883, just exactly touching on that point.

Q. Well, these lines show they don't quite touch.

A. That's not my survey—that green—this red is mine.

Q. You made this red survey in 1883?

A. Yes, sir.

178 Q. The island having gone north since 1883—no accretions on the north end since 1883?

A. No; but it is revetted and can't wash away.

Q. Since you made the last survey marked red, didn't embrace any part of the island you surveyed in 1863?

A. Not the same location, no, sir; because the island demonstrates itself on the plat as going down-stream all the time.

Q. Do you know how much would wash off the upper end—how many acres in one flood?

A. No, sir.

Q. Ever notice, to approximate it?

A. No, sir; had no occasion because I wasn't a riverman. Only went professionally, from time to time, with an interval of ten years between; as you see, I was there 1853, 1863, and 1883; last interval was twenty years.

Q. You spoke of Mr. Benjamin Seeger occupying this land as a tenant. On your map here, Arsenal Island, surveyed in 1883, we

find a line marked out designated as fence and inside the words Benjamin Seeger—that's what he occupied?

A. Yes, sir.

Q. Didn't have any of this down here fenced?

A. Yes, sir; he did; had ground not fenced up, but cultivated down here.

Q. Did he ever cultivate an inch of ground in front of those surveys 149 to 156?

A. Cultivated right in there, where my hand is, outside the field.

Q. When did he cultivate that there?

A. When I was on the premises.

Q. What year?

A. 1883.

Q. Just the year before this suit was brought?

A. Yes, sir; I don't know how long he had cultivated. He was then on the premises cultivating.

Q. When did he first commence cultivating on these premises?

A. Don't know.

Q. Did you know of his cultivating opposite these surveys before 1883?

A. I didn't; wasn't on the premises before.

Q. These lands, were they fit for cultivation for several years after forming?

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A. No, sir; not when recently formed; got to get soil first. You know, of course, enough about the Mississippi river to know that all alluvial deposits are very rich unless pure sand. Nothing grows in pure sand.

Q. Don't usually cultivate these bars the first year they are formed?

A. No, sir.

Q. I see on your map here Government dam constructed in 1878 in one place, and in another Government dam constructed in 1882. Did you say you drew this map?

A. Yes, sir.

Q. Do those figures indicate when this dyke and dam were constructed?

A. Yes, sir; I visited the premises when they were being constructed.

Q. Didn't they commence a little before?

A. I don't say they didn't. I was there during those years. Principal assistant of the United States corps had been along with me for several years; my assistant for several years; went away when the war began, and, after the war, returned, and he was employed on that work. At his solicitation I went down to see the operation.

Q. I want the date of those public works. Didn't it take the Government more than one year?

A. Several years.

Q. You have that date down there 1878. Might not that have been commenced as early as 1876 or 1877?

A. Was commenced 1876; wasn't finished till 1878.

Q. Your date indicates the finish?

A. Commenced the same year as the Centennial at Philadelphia, because I visited that work before I went.

Q. We generally understand that the Centennial year was 1876?

A. Yes, sir.

Q. Begun, then, in 1876, and completed at the date you have figured here?

A. Yes, sir.

Q. I will ask you whether any part of Quarantine Island, as you surveyed it in 1853, or Arsenal Island, as it was afterwards called, when you surveyed it in 1863, is dry land to-day.

A. No; neither in 1853 nor in 1863.

180 Mr. WILDERMAN: All washed away?

A. Been moving down-stream.

Q. I understand you to state that this island commenced washing off at the upper end and forming accretions below it, and was never stationary and fixed until the Government made these improvements—revetting?

A. Revetting; yes, sir.

Q. That is, covered with stone?

A. To prevent undermining.

Q. And built the dykes?

A. Closed up the waterway.

Q. Now stationary—doesn't wash away?

A. Makes a deposit up here—at least a thousand or more acres.

Q. And it has now ceased to wash off from the upper end?

A. Yes, sir.

Q. Government works put there hold it there?

A. Perhaps in 1885 it washed away a little at the head; began to cut away the revetment at the upper end of the island, which was not sufficiently strong for its purpose; had to meet the whole body of water coming here, and they hadn't made that strong enough nor had they extended it far enough. They have since increased and extended it.

Q. The formation still goes on below?

A. Yes, sir. There is my survey. There is where Mr. Joyce surveyed it. Now, I surveyed this subsequently for other parties than the city of St. Louis, and you perceive it had formed in here a sand-bar, and when I surveyed before there was no sand-bar. When I surveyed last it was all filled in with sand. That is called Smith's Bay; cuts his ice in there; I presume to-day all filled up.

Q. That is what is marked ice on your plat?

A. Smith's ice-house.

Q. That was made in 1883?

A. Yes, sir.

Q. Have you noticed how much further below the sand-bar extends than it did in 1883?

A. Don't know, sir; haven't seen any recent survey.

Q. Have you been down there recently?

A. No, sir. I was down in 1885, but not since. When I sur-

veyed there it was full of water; now to-day there is a sand-bar.

181 Q. It isn't dry land?

A. A sand-bar filling up all the time may have filled up to the main shore.

Q. Since 1883, your last survey here—all filled in since?

A. Yes, sir. That depends on the stage of the river in here; nothing but backwater up here. You mean the demarcation. If the river went down more of the island would be exposed.

Q. This water here is backwater from the current?

A. Yes, sir.

Q. High water backs up further and low water comes down?

A. Yes, sir.

Redirect by Mr. BELL:

Q. I understand during all these years you have been speaking of, notwithstanding the constant change going on in Arsenal Island, it has always existed as an island?

A. Yes, sir.

Q. Never has ceased to be an island?

A. Always called by the name and designation of Arsenal Island. Some people continue to call it Quarantine Island, but it is always known as Arsenal Island and its first formation was right opposite the United States arsenal.

Cross-examination by Mr. HALBERT:

Q. What was it called in 1853?

A. Quarantine Island and Arsenal Island *Arsenal Island*, and when they put the quarantine there it was called Quarantine.

o. Testimony of Mr. Murphy.

Mr. MURPHY sworn.

Direct by Mr. BELL:

Q. You are harbor commissioner of the city of St. Louis?

A. Yes, sir.

Q. How long have you been there?

A. Since 1846.

Q. What part of the city did you live in?

A. The southern part.

182 Q. How long have you known Quarantine or Arsenal Island?

A. Since 1847.

Q. Where was it then?

A. The upper end extended a hundred feet above the north wall of the arsenal.

Q. Where did it go south?

A. Must have been below that.

Q. State what it was at that time as to being an isl and in the Mississippi river.

A. It was an island.

Q. Surrounded by water?

A. Yes, sir.

Q. In the State of Missouri or Illinois?

A. Missouri.

Q. Where was the channel of the river with reference to the island?

A. Around the east side.

Q. Have you continued to know the island down from that day to the present time?

A. Yes, sir.

Q. When were you personally first on the island?

A. In the fall of 1847.

Q. What did you go for?

A. A lot of boys going to school with me—my school friends—had a canoe we used to use to convey us to the island to fish and swim. Used to start above the arsenal wall.

Q. Which side did you land on?

A. West side.

Q. Nearest the Missouri shore?

A. Yes, sir.

Q. Were you there during the following years till '51?

A. Yes, sir.

Q. In 1852?

A. I wasn't on.

Q. In 1852 what was it used for?

A. Quarantine purposes.

Q. By whom?

A. The city.

Q. How long did it continue so?

A. Some four or five years.

Q. What did the city have there?

A. A large building used for hospital purposes.

Q. Who was stationed there?

A. A health officer.

Q. What relation did the island bear to the boats coming from the lower Mississippi to St. Louis?

A. It was a quarantine station—would land there to be examined and, if they had any sick, to be fumigated and leave their sick.

183 Q. Where were the sick taken?

A. To this building.

Q. Hospital on the island?

A. Yes, sir.

Q. If there were any dead?

A. They were buried on the island.

Q. What became of those who died in the hospital?

A. They were buried there.

Q. State whether or not any other person was in possession of the island than the city of St. Louis.

A. Never knew of anybody at that time.

Q. You were on the island in 1847, 1848, 1849, 1850, 1851—knew the island during all those years?

A. Yes, sir.

Q. What sort of a hospital, if any, did the city maintain about the year 1855?

A. Understood to be a pest hospital—small-pox.

Q. Did the city have any official there?

A. It had.

Q. Maintained a small-pox hospital?

A. Yes, sir.

Q. What became of those who died?

A. Buried there.

Q. Who was in possession of the island?

A. The city.

Q. Know Benjamin Seeger?

A. Yes, sir.

Q. What position does he bear?

A. Tenant.

Q. In possession how many years?

A. Twenty years.

Q. Any improvements?

A. Yes, sir; I was there two or three years ago.

Q. Cultivate any part?

A. A part.

Q. Keeps house and cultivates?

A. Yes, sir; fence around it.

Q. From your first knowledge of the island in 1847 down to 1872 and 1873, where was the navigable channel of the Mississippi river with reference to the island?

A. Always on the east side.

Q. Between the Illinois shore and the island?

A. Yes, sir.

Q. Boats during those years navigated there, did they?

A. Yes, sir.

Q. State whether or not the channel changed about that time.

A. Occasionally they used to go up the Missouri side; low stage they couldn't.

184 Q. Finally did it reach a point where the navigation was all between Missouri and the island?

A. Yes, sir.

Q. When was that?

A. About the time the Government constructed dams and dykes on the north side in 1876 and 1877.

Q. What was the effect on navigation by the United States constructing the dam and dyke from the island to the Illinois shore?

A. I suppose it stopped the flow of water through that part of the island—made shallow water below it—and sand-bars formed down along the course of the former channel.

Q. Didn't it necessarily cause boats to navigate the channel between Missouri and the island?

A. Yes, sir; excepting in very high water. About the time the dams were constructed or about the time they were being constructed it came so finally that the channel was thrown on the west side of the island.

Q. So now the channel is between Missouri and the island?

A. Yes.

Q. From 1847, when you first saw it, down to 1872, 1873, 1874, or 1875, the channel was between Illinois and the island?

A. Yes, sir; boats used to pass on the east side of the island.

Q. During all that time when the navigable channel of the Mississippi was between the island and the Illinois shore in what State was Arsenal Island located?

A. In the State of Missouri.

Q. Explain, if you please, to the court what has been the history of Arsenal Island with reference to location in the Mississippi river—what changes, if any, have taken place, and what has caused those changes.

A. Well, since 1847 I have seen a gradual change in the island from its former location—at least where the northern point was formerly located to where it is now—changed to a considerable extent. The northern point of the island is away below where it was originally and, I think, where the southern part was when I first knew it.

185 Q. What has caused that?

A. High water and floods and shifting sand.

Q. Washing off the head?

A. Yes, sir.

Q. And lodging ground on the south?

A. Yes, sir.

Q. State whether the moving of the island has been in the direction of the current of the Mississippi.

A. Yes, sir.

Q. So that to-day the island occupies a location quite distant from the location occupied by it in 1847?

A. Yes, sir.

Q. And I will ask you whether during all this period from 1847 to the present time and during all this shifting movement that has taken place in the island has there ever been a moment of time that Arsenal Island did not exist as an island in the Mississippi?

A. No, sir; always an island there—sometimes known as Arsenal and sometimes as Quarantine.

Q. I will ask you whether on the quarantine station being established there it was called Quarantine?

A. Yes, sir.

Q. And when the quarantine was given up in 1863 and 1864 the island was known as Arsenal Island?

A. Yes, sir.

Q. But it was the same body of land, by what name it may have been called?

A. Yes, sir; I lived below it from 1868 up and had occasion to observe, going up and down the railroad right opposite.

Q. I will ask you, during your acquaintance with it from 1847 to the present time, what has been the character of the possession of the island by the city of St. Louis—exclusive or otherwise?

A. From 1850 up I can tell better about it; in 1850 they were in possession by the establishing of quarantine and the erection of buildings.

Q. Exclusive?

A. So far as I knew.

Q. Have you ever heard of anybody making a claim to the body of the island during that time, except the plaintiff in this suit?

A. No, sir.

Q. During that time the city has maintained a tenant on the island?

A. Yes, sir; and does now.

186 Cross-examination by Mr. HALBERT:

Q. How far was this island from the Missouri shore in 1847?

A. I should think about three hundred yards—the northern part of it.

Q. How far east from the Missouri shore now?

A. I should think it was seven hundred yards—six or seven.

Q. Any water running between the island and the Missouri shore in 1847?

A. Yes, sir.

Q. Could boats pass through there?

A. No, sir.

Q. Couldn't pass?

A. No, sir; used to pass in canoes.

Q. Nothing but a shoal in 1847?

A. That's all; about three hundred yards of shallow water.

Q. In 1850, 1852, and 1853, how was it then?

A. I think more water there then—understood more water between the western——

Q. Could boats pass there in 1853?

A. No, sir; never knew of any.

Q. Not during the periods of high water?

A. No, sir. I lived near the river bank and never knew of any.

Q. When was the first time you knew of boats passing between Arsenal Island and the Missouri shore?

A. Couldn't tell; passed up there myself in 1868 and 1869.

Q. On a boat?

A. A small steamboat—high water.

Q. How far now is the island below where it was in 1847 when you first knew it—how many miles down the river?

A. I should think it was a mile and a half; never measured it.

Q. How long was the island in 1853?

A. I think about a mile long.

Q. How long was it in 1863?

A. I wasn't on the island.

Q. About?

A. I should think about the same length—probably a little longer.

Q. A little longer in 1863 than 1853?

A. Yes, sir.

Q. Any difference in the size of it generally?

A. No, sir.

Q. About the same number of acres?

187 A. Well, probably not so much—not so large an island. I think some had washed away on the western side. Probably not so much width to the island; appeared to me to be that way.

Q. In 1863?

A. Yes, sir; probably more length and less width.

Q. From the time you first knew the river up till 1876, the time of the building of these dykes, this island was continually moving down the river, wasn't it?

A. Yes, sir.

Q. Been stationary since these dykes were built?

A. That has been the understanding since the dykes were built and since the revetting was put on the western shore by the Government.

Q. This is an island of sand, isn't it?

A. Yes, sir.

Q. Formation of bars in the river?

A. Yes, sir.

Q. Been moving down the river; all of it that is named Arsenal Island is a bar?

A. Yes, sir.

Q. Have you been on the island since 1876?

A. No, sir.

Q. Been on the eastern side of it?

A. I was on the western side of the island once since 1876.

Q. Been on the eastern side?

A. No, sir.

Q. When was the last time you were on the eastern side?

A. 1852 or 1853.

Q. Haven't been on the island since 1853?

A. That is, not on the island; passed up and down on boats on the eastern side where the channel of the river was.

Q. When was the last time you passed on the eastern side of the island?

A. 1873 or 1874.

Q. As a matter of fact, at a low stage of water there on the eastern side this is all dry—no water on the eastern side at all. Is that so, do you know?

A. Don't know now whether all dry.

Q. Probably not now, because the water is very high?

A. I mean ordinarily.

Q. At an ordinary stage of water—that is, between high or the way the water is now, twenty-five feet six; you don't know whether this is dry land or not on the east side?

A. No, sir.

188 Q. Then if, as a matter of fact, it is dry there and no water on the east of this body of land, you wouldn't call it an island any more than because it is called Arsenal Island—wouldn't call it an island if there is no water surrounding it?

A. No, sir.

Q. When you say it has continued to be Arsenal Island you simply mean to say it has been called that and known by that name?

A. Yes, sir.

Q. Now, you say there was a hospital erected on that in 1853?

A. 1851 and 1852, I think.

Q. Do you know, as a matter of fact, that island or the body of land then known as an island on which this hospital was erected in 1853 has all washed away since then—you know that?

A. Yes, sir.

Q. All gone—no island where this hospital was then now at all?

A. No, sir.

Q. Now, it is true also of the body of land which you knew in 1863—that body of land, as far as that locality is concerned, has all disappeared, hasn't it?

A. The island is below where it was.

Q. I say the body of land that existed there in the river in 1863 has all disappeared from that locality—gone away?

Mr. BELL: What?

Q. Gone away?

Mr. BELL: The island has shifted.

Q. Yes, sir; where the island existed in 1853 boats are passing and repassing now, and also where it existed in 1863?

A. Yes, sir.

Q. And do at all stages of water?

A. Yes, sir.

Redirect by Mr. BELL:

Q. I forgot to ask you whether you ever noticed the effect produced on the current by the dykes built on the St. Louis side.

A. Yes, sir; I observed the action of the current at the Bryant-street dyke, and also at the Chain of Rocks; never had occasion in an official capacity.

189 Q. State how it affects the current.

A. The water comes along down the face of the dyke, if it is a longitudinal dyke—goes down to the face of the lower part and turns in towards the Missouri shore; that's the effect on both the dykes built in the Mississippi there—those dykes at those points—the water comes in toward the Missouri side.

Q. Take a dyke which projects at right angles with the current out into the river.

A. The current would strike the outer face of that and go towards the Missouri shore.

Q. Instead of throwing any volume of water over to the Illinois

shore, the water will run around the end of the dyke into the Missouri shore again?

A. Yes, sir.

Q. When you state generally that boats are now navigating the Mississippi over the spot where the island was located in 1853 and 1863 you don't mean to state that you have made any survey and can say as a matter of fact that some part of Arsenal Island as it existed on the earth's surface in 1863 does not exist on Arsenal Island to-day; do you understand?

A. Yes, sir; I understand.

Q. It may well be, may it not, that the tail of Arsenal Island as it existed in 1863 or 1864 is the head of Arsenal Island as it existed when this suit was commenced?

A. That might be. I had occasion to observe in 1852 or 1853, the last time I was on the island, something that drew my attention to that very matter. When we were boys, along in 1849, 1850, 1851—in fact previous to that we had gone on the island and erected a shed on the western face where we put our clothes and stuff that was there—that was in 1847 and 1848—and when I went on the island in 1853 or 1854, after the smaller buildings had been removed by the Government, I found that this place that we had erected—the shed was two or three hundred yards where we had placed it further north than the southern end of the island was, showing a formation south of it.

Q. That is not in answer to my question. You don't seem
190 to comprehend what I am trying to get at. The question is this: Have you ever discovered as a mathematical fact that no part of Arsenal Island as it existed in 1863 and 1864, when surveyed by Cozens, was included within the survey of the island in 1883, just before this suit commenced—you don't undertake to state anything about that.

A. What is the question; didn't quite catch it.

Q. When were you on Arsenal Island last?

A. About five or six months ago.

Q. I thought you stated a moment ago the last time you were on Arsenal Island was in 1853?

A. I said the eastern end of Arsenal Island—meant to say; went down the harbor in a boat five or six months ago to see about the tenant there.

Cross-examination by Mr. EDSALL:

Q. You were speaking about these dykes built on the St. Louis side of the river and the action of the current. How are the dykes built—at right angles to the current or angling out?

A. Direct from the shore out.

Q. You see this map marked Exhibit "B" that is exhibited there?

A. The water came down to this dyke and then deflected into the Missouri shore.

Q. That's your observation on the Missouri side?

A. Yes, sir.

Q. Did you go over to the other side to examine how it affected that?

A. I didn't.

Q. Do you know as a matter of fact that between 1865 and 1873 the land washed away over here on this side of the river for nearly half a mile in width down here opposite these surveys, so that it took off nearly half a mile?

A. No, sir; I don't know about that.

Q. What was the cause of that you don't know?

A. No, sir.

Q. What current was there you don't know?

A. No, sir.

Q. All you testify about is what you saw on this (the Missouri) side?

A. Yes, sir.

191 *p. Testimony of John G. Joyce.*

JOHN G. JOYCE sworn.

Direct by Mr. KUEFFNER:

Q. What is your business?

A. City surveyor of the city of St. Louis.

Q. State whether you ever made a survey of Arsenal Island, and, if so, when, and the adjoining shores?

A. In 1881 I made a survey of the island, connecting it with the St. Louis shore, as well as connecting it with the Illinois shore—in 1881.

Q. Is that map you have there a correct map of that survey?

A. Yes, sir; the map is a correct one—map of that survey.

Q. What was the width of the river at that time from bank to bank at the head of the island?

A. At the north end about thirty-six hundred feet.

Q. What was the distance from the Illinois shore or bank at a point between these surveys 148 and 149, extending the survey line to Arsenal Island and on Arsenal Island through—how far was that?

A. Well, there was a sand-bar formed.

Q. Simply extending the survey line?

A. A sand-bar formed a short distance outside the bank of the island. The distance from the shore to that sand-bar visible at that time was fifteen hundred feet, and continuing on the same line the distance from the bank of the Illinois shore at the division line between surveys 148 and 149 was eighteen hundred and fifty feet to the bank of the island, and continuing across the island on the same line it was about nineteen hundred feet—across the island.

Q. How far from the west bank of the island to the Missouri shore?

A. Twenty-two hundred and fifty feet.

Q. From the west bank of the island to the Missouri shore?

A. Yes, sir.

Q. Now, commencing at the same point on the Illinois
192 shore, have you run at right angles to the current of the Mississippi river—what was the distance then to the island—east shore of the island.

(Objection.)

Q. Referring now to the different theories in the declaration?

A. About twenty-one hundred feet.

Q. I mean commencing on the east shore of the island?

A. On the Illinois shore, you mean?

Q. Yes, sir; commencing at the same point?

A. And going across to the Missouri shore?

Q. No; but instead of prolonging these lines that bound the surveys going at right angles?

A. Oh, that wouldn't make much dfference—a little, but not much.

Q. No material difference all through?

A. No.

Q. Now, what are the distances, commencing on the east river bank on the survey line between 156 and 157—what is the distance from there to the island?

A. Well, from the bank, as it existed then, to the sand-bar was seven hundred feet; from the bank to the east bank of the island was seventeen hundred and fifty feet—sand-bar forming from the bank of the island going down into the water; across the island on the same line, seventeen hundred and seventy-five feet. Then the distance from the west shore of the island to the Missouri shore would be about eighteen hundred feet.

The COURT: This was 1881?

A. Yes, sir.

The COURT: Does that represent water?

A. Yes, sir. This is the Government dam.

The COURT: What was the width of that?

A. Four hundred and fifty feet at this point; just a little sand-bar.

The COURT: On the line between 156 and 157 you answered about, didn't you?

A. That was seven hundred feet to the sand-bar and seventeen hundred and fifty between the Illinois shore and the bank of Arsenal Island.

Cross-examination by Mr. HALBERT:

Q. What time did you make this in 1881?

A. In the winter—opening of spring.

193 Q. What time in the spring?

A. I think about February.

Q. Got anything on the map to indicate it?

A. No, sir; but I think about February. The Missouri side was surveyed October, 1878, and the Illinois side March, 1881.

Q. The survey from which this map was made—made the survey on the Missouri side in 1878?

A. Yes, sir.

Q. Now, you surveyed Arsenal Island in 1880—December, 1880?

A. Yes, sir; surveyed the Illinois shore in March, 1881; the river bank at St. Louis I surveyed in 1878; Arsenal Island I surveyed in 1880, and the Illinois bank and this side of Arsenal Island I surveyed in 1881.

Q. When did you take this from this other sand-bar?

A. At that time.

Q. March, 1881—what part?

A. Don't know.

Q. Then the water between the Illinois shore and what was called Arsenal Island was only seven hundred feet at that time. Do you know what the depth of the water was in there?

A. No, sir; took no soundings.

Q. What was the depth of the water on the other side?

A. These soundings there were not taken at that time. I couldn't say.

Q. Was there any running water here at all in March, 1881?

A. Yes.

Q. This dyke built at that time?

A. Yes, sir; but there was an opening in the center which brought the water in here.

Q. An opening there which gave it a current?

The COURT: What was the general stage of the river?

A. It was low.

Q. Did you make this plat (exhibiting Mr. Cozens' map)?

A. No, sir. Mr. Cozens did that.

Q. Does this correctly represent the survey made by you on the present plat?

A. Yes, sir.

Q. What did you take as the shore on the Illinois side when you surveyed in 1881?

A. Top of the bank.

194 Q. As it then existed?

A. Yes, sir.

Q. Do you know how far west that was of the original bank?

A. I don't.

Q. You don't know, then, what the survey of 1814 was?

A. No, sir.

Q. Never made that?

A. No, sir.

Q. Did you ever make a survey of the west line according to the original survey?

A. No; but I made it as it existed in 1878.

Q. Do you know how it compared with the western line in 1878—how it compared with the original survey on the Missouri side of the river?

A. I have examined it and from my experience the lines must have been the same, because it was a rock bank.

Q. Then I understand the bank on the western side was not changed?

A. No, sir.

By Mr. EDSALL:

Q. As I understand you, when you surveyed this Illinois bank in 1881 you took it as the bank then was—as you then found it?

A. As I then found it—March, 1881.

Q. Whether the bank extended eastward of that in 1850 or 1860 you don't know?

A. Don't know.

Q. May it not have extended a half a mile further in 1863?

A. Don't know.

Q. If other witnesses have stated it did, you know anything to the contrary?

A. Know nothing to the contrary.

Redirect by Mr. KUEFFNER:

Q. Been there since?

A. Yes, sir.

Q. Any changes in the bank since?

A. No perceptible change. I have seen another dyke put here—about this point. This sand-bar has got higher every year; sediment from the water makes it higher.

Q. But the east bank has remained unchanged?

A. Yes, sir.

195 Mr. EDSALL: Hasn't it been filling up since 1881?

A. I say it has been filling up. I haven't been down there.

Mr. BELL: The map of Cozens and the map of Joyce, defendant's map number 1 and defendant's map number 2, are given in evidence.

(No objection.)

There was no further evidence in this case.

(Here follow diagrams marked pp. 196 & 197.)

198 The defendants moved the court to make the following findings of facts (which motion was overruled, and defendants duly excepted then and there), viz:

s. Defendants' Rejected Findings of Facts.

This is an action of ejectment instituted in the State circuit court of St. Clair county, Illinois, on January 29, 1884, to recover certain premises alleged to be in St. Clair county, Illinois, and described as follows, to wit: Bounded east by the meanders of the original bank of the Mississippi river, as surveyed by the United States Government and established in United States surveys 149 to 156, inclusive,

of the common fields of Prairie Du Pont; bounded west by the center thread of the Mississippi river, bounded north by the north line of survey 149 aforesaid, produced westwardly to the center thread of the Mississippi river, and south by the south line of survey 156 aforesaid, produced westwardly to the center thread of the Mississippi river.

The action was originally commenced against Benjamin Seeger, alleged to be in possession, and subsequently the city of St. Louis, a municipal corporation existing under the laws of the State
199 of Missouri, claiming to be the owner of the premises occupied by said Seeger and the landlord of said Seeger, was, on its motion, made codefendant, and afterwards the cause, on the application of said defendants, was duly removed into this court.

At the trial of this cause before the court, a jury being waived, it appeared that one Blumenthal in 1849 took possession, under deeds from Dushanan, Lacroix, and Pensoneau, of surveys 149 to 156, inclusive, of the common fields of Prairie Du Pont, St. Clair county, Illinois, and paid taxes thereon until 1873, when he conveyed to the plaintiff and others, under whom the plaintiff now claims. The deed from Blumenthal, on which the title and possession of plaintiff now rests, describes the property as bounded northwestwardly by low-water mark of the Mississippi river.

It appeared that Blumenthal in 1849 took possession under his deeds of the property mentioned therein, and that his actual possession never extended further west than the easterly edge of the Mississippi river, and that the plaintiff succeeded to the said possession of Blumenthal prior to the commencement of this
200 action. It appeared that between 1814 and 1850 the Mississippi river in front of the property receded in a westwardly direction, so that surveys 149 to 156, inclusive, gained forty acres of ground, and that from 1850 to the present time the river has encroached on the premises so that the same have lost one hundred acres of ground, the net loss being sixty acres of ground.

It appeared that an approved survey of Arsenal, then Quarantine, Island was made by William H. Cozzens in 1853 under the instructions of the U. S. Surveyor General; also that said island was assigned by the Secretary of the Interior to the St. Louis public schools in 1863 and 1864. The first assignment bears date February 10, 1863, and covers 109.92 acres of the island. The second assignment is dated September 8, 1864, and conveys 9.65 acres. The two assignments embrace the entire island, which contained 119.57 acres; also that said island was sold and conveyed by the public schools for the sum of $32,000 to the city of St. Louis in 1866; also that surveys of the island were made in 1853, 1863, 1881,
201 and 1883, showing its location at these various periods. Witness were produced who had known the island as early as 1847. The island was originally in the city of St. Louis and State of Missouri, opposite the arsenal and west of the main channel of the river and of the center thread of the river. It has moved south and westwardly. The change effected in the location of the island since 1847 has been gradual in its character and has been caused

by the action of the water of the river washing the head of the island and adding new ground to the foot thereof. The city of St. Louis has been in possession of the island from 1850 to the present time. The defendant Seeger occupies the island as the tenant of the city of St. Louis. He cultivates the land and resides thereon. Since 1847 Arsenal Island has always existed as an island in the Mississippi river.

The island existing at the commencement of this action is the same island that existed in 1847, except that its location had changed as above stated and it had become attached to the
202 Illinois shore in the manner hereinafter stated. At no time had the island ceased to exist. Prior to 1874 the navigable channel of the Mississippi river was between Arsenal Island and the Illinois shore.

In 1874 boats commenced navigating between the island and the Missouri shore. In or about the years 1878 to 1882 the United States Government caused to be constructed a stone dyke leading from the head of the island to the Illinois shore and subsequently a dam south of the dyke between the island and the Illinois shore. The effect of these structures has been to stop the flow of water at low water between the island and the Illinois shore, and, as a necessary result, land has been created connecting the island with the Illinois shore in front of the Prairie Du Pont common fields. During the yearly stage of high water the water flows between the island and the Illinois shore, and at the date of the trial—July 5, 1888—it was so flowing.

The defendants moved the court to give the following dec-
203 larations of law, all of which were refused by the court and defendants duly excepted then and there, viz:

t. Defendants' Refused Declarations of Law.

1. The court declares the law to be that under the facts in this cause the plaintiff has shown no title to the premises known as Arsenal Island at and prior to the commencement of this action, and the judgment, therefore, must be for the defendants.

2. The court declares the law to be that under the facts in this cause the plaintiff has exhibited no title to the bed of the Mississippi river beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie Du Pont.

3. The court declares the law to be that under the facts in this cause Arsenal Island is not an accretion to plaintiff's land and the plaintiff has no claim to the ownership of said island or any part thereof under the law of accretion.

4. The court declares the law to be that the title to Arsenal Island held by the city of St. Louis under the United States and the possession of said premises by said defendant, extending
204 from 1850 to the present time, have not been divested by the movement of the island in the Mississippi river.

5. The court declares the law to be that the deed of August A. Blumenthal and wife to Edward Rutz and others, introduced in evi-

dence, did not convey title to the bed of the Mississippi river beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie Du Pont, except to the accretion or sand-bar lying northwestwardly and between the extended lines of said surveys.

6. The court declares the law to be that if the property known as Arsenal Island was granted by the United States to the public schools of the city of St. Louis, and that at the time of such grant the same was an island in the Mississippi river situate in the State of Missouri, then the ownership of accretions attaching themselves to such island while said island remained in said State is governed by the laws of the State of Missouri; and if said island was situated entirely upstream a mile or two miles north of the northern-
205 most point of land of the plaintiffs fronting on the Mississippi river, and if accretions thereupon formed at the lower or down-stream end of said island in said State until they reached a point opposite to or in front of the river front of the plaintiff's land or between the extended lines of his surveys 149 to 156 described in the declaration, such accretions became and were the property of the owner of the island shore to which they had become attached, and the title of such owner is not divested by the fact that the navigable channel of the Mississippi river changed its course so as to run between said island and the eastern shore of the State of Missouri, and the further fact that by means of a dyke and a dam run out from the east shore of the Mississippi river (the Illinois shore) said island has become attached to the Illinois shore, and the intervening space has been filled up by deposits of mud, so that, except in high stages of water, there is no water running between said island and the Illinois shore of said river.

206 7. The court declares the law to be that if the current of the Mississippi river undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi river, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was changed, that thereby the west boundary line of the land of the plaintiff or of his grantor changed accordingly and to correspond with the changes in the bed and center thread of said river opposite said land.

8. The court declares the law to be that the boundary line between the States of Illinois and Missouri is the center thread of the Mississippi river.

9. The court declares the law to be that if accretions formed and attached themselves to the down-stream end of Arsenal Island, in the State of Missouri, and thereafter other accretions attached themselves to the first-mentioned accretions on the east side of the island, towards the Illinois shore, that the last-mentioned accre-
207 tions belong to the owner of the first accretions, notwithstanding they extended eastwardly of the center thread of the river.

10. The court declares the law to be that if a sand-bar extended southwestwardly from the foot of Arsenal Island, in the State of

ssouri, and subsequently accretions attached themselves to the
st side of said sand-bar and extended eastwardly across the center
207 read of the river into the State of Illinois, the owner of the island
as and is the owner of said sand-bar and said accretions.

11. The court declares the law to be that if the current of the Mississippi river gradually undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi river, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was gradually changed, that thereby the western boundary line of the land of the plaintiff or of said grantor changed accordingly to correspond
208 with the changes in the bed and center thread of the river opposite said land.

No declaration of law was given by the court except so far as the same may be included in the following findings of the court:

The court thereupon, to wit, on April 1, 1889, at the January term, 1889, to which the cause had been continued under advisement, made the following findings of facts against the objection of defendants, who then and there duly excepted:

u. Findings of Facts, Ap'l 1, '89.

In the Circuit Court of the United States for the Southern District of Illinois. Jan'y Term, A. D. 1889.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Gen. No. 6878. Ejectment.

This cause having been heretofore, to wit, on the 5th day of July, 1888, in pursuance of the written stipulation of counsel for the respective parties on file herein, heard and tried by the court without a jury, and the court having heard and considered the evi-
209 dence in the case, and having also heard the arguments of counsel for the parties, thereupon the court took the case under advisement.

And now, on the 1st day of April, 1889, the court, being sufficiently advised in the premises, doth find the following facts:

1. That in the year 1849 and 1850 one August A. Blumenthal acquired, by deeds from the parties then in actual possession of said premises as the owners thereof, the title in fee to surveys numbered 149, 150, 151, 152, 153, 154, 155, and 156, of the common fields of Prairie Du Pont, in the county of St. Clair, in the State of Illinois, and that Edward Rutz, the plaintiff in this suit, acquired from said Blumenthal his said title to said land prior to the commencement of this suit.

2. That the map or plat made by G. F. Hilyard, county surveyor of St. Clair county, Illinois, produced in evidence and marked "Plaintiff's Exhibit B," is a correct map and plat of the said premises and the several surveys and lines indicated thereon; which said

map is hereby included in and made a part of these findings
210 and to which reference is made for greater certainty.

3. That, as appears from the evidence and plats read and produced in evidence, the said surveys numbered 149, 150, 151, 152, 155 are each one arpent (or about twelve rods) in width, and the said surveys 153 and 154 are each two arpents (or about twenty-four rods) in width, and that the said survey numbered 156 is three arpents (or about thirty-six rods) in width, and that said several surveys adjoin each other and lie side by side in the order the same are respectively numbered, survey 149 being upon the extreme northerly and survey 156 being upon the extreme southerly side of the entire tract, and that each and all of said surveys extended to and were bounded by the Mississippi river on the northwesterly ends thereof and extend southeasterly from the Mississippi river, the average distance of about one thousand rods, to the hills or bluffs on the Illinois side of said river.

4. That said Blumenthal, under said deeds to him, whereby
211 he acquired title to said surveys, in the year 1850 entered upon and took the actual possession of said surveys, including as a part thereof the accretions thereto formed on the river front of said surveys embraced within the side lines of said surveys, extended without deflection in a direct line across such accretions northwesterly to the Mississippi river, and said Blumenthal so held such possession of said premises and paid all taxes thereon each year from January 23d, 1850, to Dec'r 23, 1873, at which said last-mentioned time said Blumenthal conveyed 500 acres off from the northwestern end of said premises by deeds to said Edward Rutz and others, whose title the plaintiff acquired in fee on and prior to the 7th day of March, 1883, and thereupon succeeded to said Blumenthal's said title to and possession of said premises; and that the said Blumenthal, from whom the plaintiff so derived such title and possession as aforesaid, and the several owners of the surveys and lands in the said Prairie Du Pont common fields adjoining said surveys 149 to 156, both on the northerly and southerly
212 sides thereof, have each ever since the year 1850 up to the present time claimed, possessed, fenced, enclosed, used, and occupied as a part of their said several surveys and lands, respectively, that portion of the said accretions thereto embraced within the side lines of their respective surveys extended without deflection in direct lines northwesterly to said river; and that ever since the year 1849 the several owners of said surveys have by common consent recognized and acted upon such extension of the side lines of their several surveys in a direct course across said accretions to the river as the true and proper boundary and division lines between them in respect to the accretions formed on the river front of said surveys.

5. That the premises described in the declaration and sued for are located at the present time and were at the commencement of this suit eastwardly of the center of the main channel of the Mississippi river and in the county of St. Clair, in the State of Illinois.

6. And the court further finds that, as appears from the evidence and from the survey of said lands made by William L. Deneen as the county surveyor of St. Clair county, Illinois, on November 15th, 1850, produced in evidence at that time, the dry land of said surveys numbered 149 to 156, inclusive, extended westwardly to the line indicated by the words "River bank, 1850, by Deneen," on the map marked "Plaintiff's Exhibit B;" and that the main land of said surveys numbered 149 to 156, inclusive, in the year 1850, extended westwardly over and across and included about sixty rods in width of the lands described in the declaration, to wit, that portion of said lands lying between the river bank in 1850, as indicated by said Deneen's survey, and the line marked "Old surveyed river bank, 1814," as said lines are respectively designated on said map; and that in the year 1863 the main and dry lands of the surveys 149 to 156 extended about fifteen chains or sixty rods further westward and beyond the line of the river bank so surveyed by said Deneen in 1850, and that eastern bank of the river in 1863 was about one-half a mile west of the certain dwelling-house hereinafter mentioned, then standing on said survey
214 No. 151, and so continued until the year 1865.

7. That the greater part of the so-called Arsenal Island, which now extends over and is embraced within the boundaries of the lands described in the plaintiff's declaration, is located upon the site of the dry lands of said surveys numbered 149 to 156, inclusive, as the same existed from 1850 to 1865, and that the residue thereof (being about one-eighth of the entire width of the same) is located upon the bed of the Mississippi river as it then existed, and easterly of the thread or middle line of said river.

8. That between the years 1865 and 1873 the river front of the said surveys numbered 149 to 156 was washed away, so that in July, 1873, the river front of said lands only extended to the line marked "River bank, 1873," on said map, and that said river bank thereafter continued to wash away and cave in until it reached the line marked "River bank, 1884," on said map.

9. And the court further finds from the evidence that such washing away of said river bank did not take place slowly and
215 imperceptibly; but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away of said river bank occurred principally at the spring rises or floods of high water in the Mississippi river, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks, before the waters of the river would subside to its ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time; that in the spring of the year 1872 Mr. Augustus A. Blumenthal, Jr., the occupant of the

land at the time, lived in the dwelling-house situated on said
216 survey No. 151, and the river had, since the year 1865, so encroached upon the land that the house was then but about four or five hundred feet back from the river bank and water's edge as it then existed. When the spring rise or flood occurred that year the said Blumenthal became alarmed for the safety of his house, and immediately commenced taking said house down and removing the same further from the river bank, and in so doing worked 6 or 8 days in succession, at the expiration of which time the bank had caved in and washed away so rapidly that the bank and waters of the river had approached within a few feet of the foundation of the house, and before the waters subsided carried away the greater portion of the foundation of the house, and the flood which came in the spring of 1873 carried away the residue of said foundation, with at least 100 feet more of the land; and that such caving in and washing away continued until the building of the dyke at the point indicated on said map on the eastern side of the river above the said lands, which dyke was built by the United States Government in the years 1876 to 1878.

217 10. That the said washing away of the bank on the front of the said surveys was caused by dykes built by the city of St. Louis on the western side of the river at the points where the same are indicated on said map by causing the current of the river to flow over to and against the eastern shore; that the western bank of the river opposite the plaintiff's said land is rocky, and there appears to have been no material change in that bank since the first survey thereof by the United States Government.

11. The court further finds that in 1853 there existed an alluvial formation or body of land on the western side of the river and near the Missouri shore, then called Quarantine Island, which, in that year (1853), was surveyed by William H. Cozzens. The location and boundaries of said island are indicated upon said map, the same being shaded red, and having written thereon the words and figures "Quarantine Island, also called Arsenal Island, as surveyed in 1853." In 1858 the said island, in low water, extended to and adjoined the main land or the western or Missouri side of the
218 river. At some time between the years 1853 and 1863 the greater portion of said Quarantine Island washed away, so as only to leave remaining that portion thereof embraced within a second survey thereof made by said Cozzens in January, 1863, the location and boundaries of which are indicated upon said map by the words "Survey No. 411 of St. Louis land, school lands, Arsenal Island, surveyed in 1863;" the letters and lines thereof being shaded green upon said "Exhibit B."

12. Said Quarantine Island, since its survey in 1863, has been called Arsenal Island, and at the time of said surveys of said island in 1853 and 1863 the same was situated on the west side of the main channel of the Mississippi river and about a mile higher up the river than the lands described in the declaration, and no part of the same then extended down the river opposite said plaintiff's said lands.

13. On February 10th, 1863, a part of the said island, designated as "Survey No. 411 of St. Louis school lands," containing 109 and twenty-two hundredths acres, was assigned to the St. Louis
219 public schools, in pursuance of the act of Congress of June 13th, 1812, entitled "An act making further provision for the settling claims of land in the Territory of Missouri" (2 U. S. Stat. at Large, p. 748), and of the supplementary act of May 26th, 1824 (4 U. S. Stat. at Large, p. 66), and the residue of said island, as so surveyed in 1863, being nine and sixty-five hundredths acres on the northern end thereof, appears to have been also assigned to said St. Louis public schools on August 25th, 1864, as indemnity for school lands lost in section 16, T. 45 N., range 7 east, of the St. Louis district, Missouri."

14. By deed dated February 8th, 1866, the St. Louis public schools conveyed its right and title to said Quarantine or Arsenal Island to the city of St. Louis, which lands are described in such deed as situated "in the county of St. Louis and State of Missouri."

As early as the year 1850 the city of St. Louis occupied said Quarantine or Arsenal Island for quarantine purposes, and so continued to occupy the same until the year 1875, when the said city of St. Louis leased said island to the defendant, Benjamin
220 Seeger, who, as such tenant, lived on and occupied the said island up to the term of the commencement of this suit. During the years 1861 to 1865, inclusive, the United States Government occupied a portion of said island for the purpose of a military hospital and as a place for the burial of those dying at such hospital. The dry land described in the declaration in this case did not arise or form in the Mississippi river until about the year 1874 and subsequent thereto, the same having, after the year 1865 and prior to 1874, become, in part, submerged and washed away in the manner stated in the 8th paragraph of these findings.

15. The court further finds from the evidence that there is not now and was not at the time of the commencement of this suit any land whatever above the surface of the water in said river on the site or within the boundaries of said Quarantine Island as so surveyed in 1853 nor upon the site or within the boundaries of said island as so surveyed in 1863, but that the same was subsequently wholly washed away.

16. The court further finds that in the floods in the Mis-
221 sissippi river before mentioned large portions of the upper or northern end of said island washed away; that in such floods a bar formed each year below and joined to the foot of the island, extending down the river for the distance of a quarter of a mile or more; that when the water subsided after such a spring flood the surface of such bar appeared in sight above the surface of the water, but nearly on a level with the water, for the greater length of such bar; that during the first summer after such a bar had formed willows grew upon it, and the flood which occurred the next succeeding spring deposited more sand and soil on the bar, which was retained by the willows, and the bar so formed was thus raised

higher in each successive annual flood so long as it was overflowe
in high water, and this process was repeated at each succeeding floo
by the formation of another bar below that formed by the preceed-
ing flood, which in turn was covered with a growth of willows and
raised higher by each succeeding flood until it ceased to be over-
flowed.

222 17. The court further finds that such bars were not formed by accumulations of sand or soil washed up against the lower end of the island, but by the deposits in times of flood of soil and sediment upon the bed of the river below the island.

18. And the court further finds that before the said island was washed away the main and navigable channel of the Mississippi river was eastwardly of the island, but after the said bar was formed lower down the river in front of the plaintiff's land the main and navigable channel of the river has been and still is on the west side of the said bars or island, and that since the said bars or island had so formed in the river in front of said surveys the boats navigating the river have not run between the bar or island and the bank of the eastern or Illinois shore of the river.

19. The court further finds that in the years 1876 to 1878 the United States Government built a dyke from the eastern or Illinois shore of the river to the bar or island, as it then existed, about

223 sixty rods northerly, or higher up the river than the north line of the plaintiff's said land, and which said dyke is indicated on said map by the line having the word "dyke" written beneath the same.

And that in the years 1878 to 1882 the United States Government built a dam above said dyke from a point near the head of said bar or island to the eastern or Illinois shore on the line designated "dam" on said map; that after said dyke and dam were built the flow of the water through the channel or space occupied by water between the said bar or island which had so formed in front of the river bank of plaintiff's land as it existed at that time was thereby impeded and the channel or space gradually filled up by deposits from the river, so that by the year 1884 the same became dry land from the line in front of the said surveys 149 to 156, marked "River bank, 1884," out to the western side of the said bar or island on the northwestern end of said surveys, as indicated on said map, and that the same has since continued to be and is now dry land, except in extremely high water, and that the lands described

224 in the declaration embraces so much thereof as lies westerly of the line marked on said map with the words "Old surveyed river bank, 1814," and easterly of the middle or thread of the main channel of the Mississippi river and between the extended lines of said surveys, as indicated on said map marked "Plaintiff's Exhibit B."

20. The court further finds that the plaintiff is and was on and prior to the first day of January, A. D. 1884, and at the time of the commencement of this suit the owner in fee of said lands described in the first count of the declaration, situated in the county of St.

Blair and State of Illinois, and that the defendants are guilty of unlawfully withholding the possession thereof from the plaintiff in manner and form as alleged in the declaration.

21. And that the value of the said lands in controversy in this suit exceeds sixteen thousand dollars.

Enter.

W. J. ALLEN,
U. S. Dist. Judge.

(Endorsed:) Filed April 1, 1889. J. T. Jones, clerk.

225 And judgment was accordingly rendered for plaintiff for the possession of the above-mentioned premises, as appears from the judgment entered April 1, 1889; to which the defendants then and there excepted.

Afterwards and during the term and in due time the defendants moved for a new trial in words and figures as follows, to wit:

v. Motion for a New Trial.

In the Circuit Court of the United States for the Southern District of Illinois. February Term, 1889.

EDWARD RUTZ
vs.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Ejectment.

Come now the said defendants, by Leverett Bell and William C. Kueffner, their attorneys, and move the court to set aside the finding and judgment herein and to grant them a new trial, for the following reasons:

1. The findings of the court are not warranted by the evidence.
2. They are against the evidence.
3. They are against the law of the case.

226 4. The court admitted improper evidence for the plaintiff against the objection of the defendant.

5. The court refused proper evidence offered by the defendants.
6. The court gave improper declarations of law on behalf of the plaintiff.
7. The court refused proper declarations of law asked by the defendants.
8. Under the evidence in this case the court should have found the issues for the defendants.
9. The plaintiff has not shown title to any of the lands sued for.

And for other good and valid reasons.

By LEVERETT BELL AND
WILLIAM C. KUEFFNER,
Their Attorneys.

(Endorsed:) Filed April 10, 1889. James T. Jones, clerk.

Which motion was continued to the June term, 1889; which motion having been heard by the court, at said June term, was, on the 4th day of November, 1889, and during said term, over-
227 ruled by the court, and defendants then and there duly excepted.

That the foregoing proceedings may be presented and made part of the record, this bill of exceptions was signed, sealed, and allowed on the 4th day of November, 1889.

WILLIAM J. ALLEN, *Judge.* [SEAL.]

(Endorsed:) Filed Nov. 4, 1889. J. T. Jones, clerk.

And afterwards, to wit, on the day and year last aforesaid (November 4th, 1889), came the defendants, by their attorneys, and filed in said clerk's office their bond on writ of error in said cause; which said bond is in the words and figures following, to wit:

Bond on Writ of Error.

Know all men by these presents that we, Benjamin Seeger and the city of St. Louis, as principals, and William C. Kueffner and Leverett Bell, as sureties, are held and firmly bound unto Edward Rutz in the sum of one thousand dollars, to be paid to the
228 said Edward Rutz, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 4th day of November, A. D. 1889.

Whereas the above-named Benjamin Seeger and the city of St. Louis have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the case of Edward Rutz against Benjamin Seeger and the city of St. Louis by the circuit court of the United States for the southern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Benjamin Seeger and the city of St. Louis shall prosecute their said writ of error to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

BENJAMIN SEEGER, [SEAL.]
By LEVERETT BELL, *His Att'y.*
229 THE CITY OF ST. LOUIS, [SEAL.]
By LEVERETT BELL, *City Counsellor.*
LEVERETT BELL. [SEAL.]
W. C. KUEFFNER. [SEAL.]

Sealed and delivered in the presence of—

——— ———.

(Endorsed:) Filed November 4, 1889. James T. Jones, clerk.

230 *Clerk's Certificate.*

UNITED STATES OF AMERICA, } ss:
Southern District of Illinois, }

I, James T. Jones, clerk of the circuit court of the United States within and for the said southern district of Illinois, do hereby certify that the foregoing is a true and correct transcript of the record, being a copy of all the papers filed and the proceedings of court thereon had, in a certain cause lately pending in said court wherein Edward Rutz was plaintiff and Benjamin Seeger and The City of St. Louis were defendants, as fully as the same now appears from the records and files in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Springfield, in said district, this 21st day of December, in the year of our Lord one thousand eight hundred and eighty-nine, and of our Independence the one hundred and fourteenth year.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

JAMES T. JONES, *Clerk.*

231 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Edward Rutz, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Illinois, wherein Benjamin Seeger and The City of St. Louis are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. William J. Allen, district judge of the United States for the southern district of Illinois, at Springfield, in said district, this 4th day of November, in year of our Lord 1889, and of our Independence the 114th year.

WILLIAM J. ALLEN,
U. S. Dist. Judge.

I admit service of the foregoing citation this 4th day of November, 1889.

J. K. EDSALL,
Att'y for Edward Rutz.

[Endorsed:] Benjamin Seeger *et al. v.* Edward Rutz. Citation.

Endorsed on cover: S. Illinois C. C. U. S. No. 1535. Benjamin Seeger and The City of St. Louis, plaintiffs in error, *vs.* Edward Rutz. Filed January 6, 1890.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1889.

BENJAMIN SEEGER and THE CITY OF ST. LOUIS, Plaintiffs in Error,
vs.
EDWARD RUTZ, Defendant in Error. } 1535.

Error to circuit court of the United States for the southern district of Illinois.

It is hereby stipulated that the printed pages hereto annexed contain so much of the transcript of the record in this cause from the circuit court of St. Clair county, filed in the court below May 31, 1884, as embraces the placita of said St. Clair circuit court and the declaration therein contained as amended November 5, 1886.

And it is further stipulated that this additional transcript, including said amended declaration, may, by leave of the court, be filed in the Supreme Court of the United States as a part of the record in this cause.

Dated March 11, 1890.

LEVERETT BELL,
Att'y for Plaintiffs in Error.
JAMES K. EDSALL,
Att'y for Defendant in Error.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } *ss:*

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that in a certain cause wherein Edward Rutz is plaintiff and Benjamin Seeger and The City of St. Louis are defendants the five printed pages hereto annexed and numbered from 1 to 5, inclusive, contain so much of the transcript of the record in said entitled cause from the circuit court of St. Clair county, Illinois, filed in my office May 31, 1884, as embraces the placita of said St. Clair circuit court and the declaration therein contained, as amended November 5, 1886, as the same appears of file in my said office.

The Seal of the Circuit Court of the United States for the South'n Dist. Ill.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this 14th day of March, 1890.

JAMES T. JONES, *Clerk.*

Pleas in the circuit court of the United States for the southern district of Illinois, held at the United States court-rooms, in the

city of Springfield, in said district, before the Hon. William J. Allen, judge of the district court, and in the absence of the Honorable Walter Q. Gresham, circuit judge in and for said district and the seventh circuit of the United States, sole presiding judge, on the first day of April, A. D. 1889, and of our Independence the one hundred and thirteenth year.

JAMES T. JONES, *Clerk.*

EDWARD RUTZ
v.
BENJAMIN SEEGER and THE CITY OF ST. LOUIS. } Gen. No. 6878. Ejectment.

Removed from St. Clair circuit court.

Be it remembered that on the 31st day of May, 1884, there was filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois a certain transcript of the proceedings, records, and files in the above-entitled cause, then lately had in the circuit court of the county of St. Clair, in the State of Illinois, in words and figures following, to wit:

STATE OF ILLINOIS, } ss:
St. Clair County, }

At a regular term of the circuit court within and for the county of St. Clair and State of Illinois, begun and held at the court-house, in the city of Belleville, in said county of St. Clair, on Monday, the 18th day of February, A. D. 1884, it being the third Monday of February, A. D. 1884, according to the act of the General Assembly, by the Hon. William H. Snyder, one of the judges of the third judicial circuit of the State of Illinois, of which the said county of St. Clair forms a part, the following proceedings were had, to wit:

Present: Honorable William H. Snyder, judge; Frederick Ropiequet, sheriff; Robert D. W. Holder, State's attorney; George H. Stolberg, clerk.

Be it remembered that on the 29th day of January, 1884, the following declaration was filed, to wit:

STATE OF ILLINOIS, } ss:
County of St. Clair, }

In the Circuit Court of said County. February Term, A. D. 1884.

Edward Rutz, the plaintiff, complains of Benjamin Seeger, the defendant herein, in a plea of ejectment—

For that the said plaintiff, on the first day of January, A. D. 1884, was lawfully possessed of a certain parcel of land situated in the county of St. Clair and State of Illinois, viz:

Commencing the survey thereof at a point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-

line, in the common fields of Prairie du Pont, from which the southernmost corner of said survey number one hundred and forty-eight, at the bluffs, bears S. 33½° E. (var. 6°) two hundred and forty-nine and $\frac{25}{100}$ (249.25) chains, thence north 33½° W., with said line of said surveys extended, to the center thread of the Mississippi river; thence along the center thread of said river to the line between survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157) extended to said center thread of said river, making the right-angle distance between the said extended lines 34.60 chains; thence south 33½° E. along said last-mentioned extended line to a point in the line between said surveys one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the most southern corner of said survey one hundred and fifty-six bears south 33½° east two hundred and fifty-four chains distant; thence along the meanders of the original bank of the Mississippi river, as surveyed by the United States Government in surveying said common fields, to the point of the beginning, with the appurtenances, which lands and tenements plaintiff claims in fee.

And the plaintiff being so possessed thereof, the defendant afterward, to wit, on the second day of January, A. D. 1884, entered into said lands and tenements, and now unlawfully withholds possession thereof from the plaintiff, to the damage of the plaintiff in the sum of $10,000; wherefore he brings suit.

And for that also the said plaintiff was, on the first day of January, A. D. 1884, possessed of a certain parcel of land situate in the county of St. Clair and State of Illinois, viz:

Commencing the survey thereof at point on the line between surveys one hundred and forty-eight (148) and one hundred and forty-nine (149) of the common fields of Prairie du Pont, from which the southernmost corner of said survey one hundred and forty-eight, at the bluffs, bears south 33½° east 249.25 chains distant, thence, at right angles with the center thread of the Mississippi river, in a northwestern course to the center thread of said river; thence down said center thread of said river in a southwestern course to a point where a line run at right angles with the center thread of said river will strike a point on the line between surveys number one hundred and fifty-six (156) and one hundred and fifty-seven (157) of said common fields, from which the southernmost corner of said survey one hundred and fifty-six bears south 33½° east two hundred and fifty-four chains distant; thence southeasterly to said last-mentioned point, and thence northeasterly with the meanders of the east bank of the Mississippi river, as surveyed by the United States Government in making the survey of the said common fields, to the point of beginning, which said lands and tenements plaintiff claims in fee, with the appurtenances.

And the plaintiff being so possessed thereof, the defendant afterwards, to wit, on the second day of January, A. D. 1884, entered into said lands and tenements, and now unlawfully withholds possession thereof from the plaintiff, to the plaintiff's damage of $10,000; wherefore he brings suit.

And for that also the plaintiff, on the first day of January, A. D. 1884, was possessed of a certain parcel of land situated in the county of St. Clair and State of Illinois, viz:

Commencing the survey thereof at a point on the line between survey one hundred and fifty-six (156) and survey one hundred and fifty-seven (157), in the common fields of Prairie du Pont, from which the most southern corner of said survey one hundred and fifty-six bears south $33\frac{1}{2}°$ E. two hundred and fifty-four chains distant, thence in a northeastern course along the meanders of the east bank of the Mississippi river, as surveyed by the United States Government, to a point on the line between surveys number one hundred and forty-eight (148) and one hundred and forty-nine (149), in said common fields, from which the southernmost corner of said survey one hundred and forty-eight (148), at the bluffs, bears S. $33\frac{1}{2}°$ E. 249.25 chains distant; thence on a line at right angles with the said meander line, where it bisects said point, to the center thread of the Mississippi river; thence southwesterly down along said center thread to a point thereon where a line drawn therefrom at right angles with the said meander line will intersect the point of beginning; thence along said line so drawn to the point of beginning, with the appurtenances, which lands and tenements plaintiff claims in fee; and plaintiff being so possessed thereof, the defendant afterward, to wit, on the 2d day of January, A. D. 1884, entered into said lands and tenements, and now unlawfully withholds possession thereof from the plaintiff, to plaintiff's damage of $10,000; wherefore he brings suit.

R. A. HALBERT,
Pl'ff's Att'y.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 1535. Benjamin Seeger *et al.*, pl'ffs in error, *vs.* Edward Rutz. Stipulation and addition to record. [Stamped:] Office Supreme Court U. S. Filed Mar. 17, 1890. James H. McKenney, clerk.

THE ARSENAL ISLAND CASE.

SUPREME COURT OF THE UNITED STATES.

No. ~~1535~~. 1096.

BENJAMIN SEEGER AND THE CITY OF ST. LOUIS,

Plaintiffs in Error,

vs.

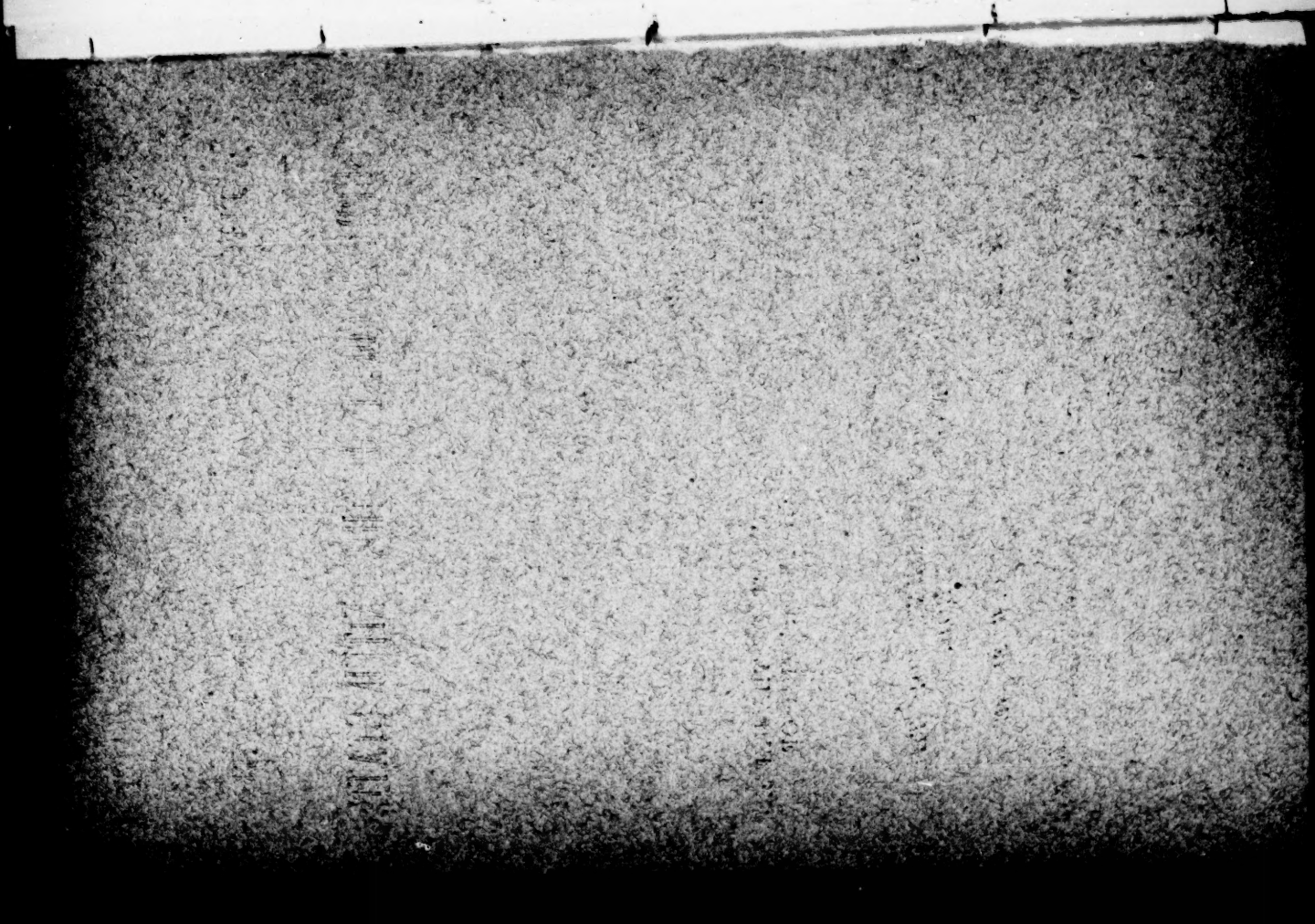
EDWARD RUTZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

BY LEVERETT BELL AND W. C. KUEFFNER.

WOODWARD & TIERNAN PRINTING CO., 309 TO 315 N. THIRD STREET, ST. LOUIS.



THE ARSENAL ISLAND CASE.

Supreme Court of the United States.

No. ~~1635~~ 1096.

BENJAMIN SEEGER AND THE CITY OF ST. LOUIS,

Plaintiffs in Error,

vs.

EDWARD RUTZ.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT AND ARGUMENT FOR THE PLAINTIFFS IN ERROR.

STATEMENT.

This is an action of ejectment, instituted in the State Circuit Court of St. Clair county, Illinois, on January 29, 1884, to recover certain premises, alleged to be in St. Clair county, Illinois, and described as follows, to wit: Bounded east by the meanders of the original bank of the Mississippi river as surveyed by the United States government and established in United States surveys 149 to 156 inclusive of the common fields of Prairie du Pont; bounded west by the center thread of the Mississippi river; bounded north by the north line of survey 149 aforesaid, produced westwardly to the center thread of the Mississippi river; and south by the south

line of survey 156 aforesaid, produced westwardly to the center thread of the Mississippi river. The action was originally commenced against Benjamin Seeger, alleged to be in possession, and subsequently the city of St. Louis, a municipal corporation existing under the laws of Missouri, and a citizen of said state, claiming to be the owner of the premises occupied by Seeger and the landlord of said Seeger, was, on its motion, made a co-defendant, and afterwards the cause, on the application of said defendants, was duly removed into the Circuit Court of the United States, for the Southern District of Illinois.—Record p. 25.

At the trial of the cause before the Court, a jury being waived, it appeared that one Blumenthal, in 1849, took possession under deeds from Dushanau, Lacroix and Pensoneau of surveys 149 to 156 inclusive of the common fields of Prairie du Pont, St. Clair county, Illinois, and paid taxes thereon until 1873, when he conveyed to Edward Rutz, and others, under whom the said Rutz now claims. The deed from Blumenthal, on which the title and possession of the defendant in error now rests, describes the property as bounded northwestwardly by low water mark of the Mississippi river.—Record p. 40.

It appeared that Blumenthal, in 1849, took possession under his deeds, of the property mentioned therein, and that his actual possession never extended further west than the eastern edge of the Mississippi river, and that the defendant in error succeeded to the possession of Blumenthal prior to the commencement of this action. It appeared that between 1814 and 1850 the Mississippi river in front of the property receded in a westwardly direction, so that surveys 149 to 156 inclusive gained forty acres of ground; and that from 1850 to the present time the river has encroached on the premises so that the same have lost one hundred acres of ground; the net loss being sixty acres of ground.—Record p. 79.

The evidence established that the Prairie du Pont common fields were included in "a tract of four leagues of land square," as expressed in the grant of June 22, 1722, made by Pierre Duguet de Boisbriant, First Lieutenant of the King of France and commandant in the Illinois, and Marc Antoine, de la Loire Des Ursuis, principal commissary of the royal company of the Indies, to the missionaries of Cahokia and Tamarois, who seem to have been under the control of the Bishop of Quebec. This grant is bounded on the west by the Mississippi river, including the adjacent islands, beginning a quarter of a league above the little river of Cahokia and extending south and east for quantity. The grant is in fee simple, and from it have emanated the titles to the lands in the Prairie du Pont common fields. The Prairie du Pont common fields were surveyed by the United States, by Elias Rector, in 1808, who made a plat thereof, and certified, of date May 23, 1808, that the surveys laid down by him were made by and with the aid and consent of the citizens of Prairie du Pont, and that many of the

ancient boundaries were found and governed the surveys, and were also correctly executed by him as laid down on the plat.

The report of Michael Jones and E. Backus, commissioners of the United States, bearing date December 31, 1809, containing said claims, surveys and plats, was transmitted by them to the secretary of the treasury, according to law, and by the third section of the act of congress of February 20, 1812, 2 U. S. Stat. at Large, 678, the land was confirmed in terms to the respective claimants as set forth in said report. The above documentary evidence was introduced by the plaintiff below.—Record pp. 80 to 84 inclusive.

The greater part of the Arsenal Island, within the boundaries mentioned in the declaration, is located at the present time on the site of the dry land of surveys 149 to 156, as the same existed from 1850 to 1865, and the residue about one-eighth of the width of the island is located on the bed of the Mississippi river east of the middle thread of the river.—~~Eighth~~ Seventh finding of fact by the Court; Record p. 119.

The east river bank of the Mississippi river on which the above mentioned surveys fronted, was in 1850 west of its position in 1814, and in 1873 it was east of its position in 1850, and in 1884 it was east of its position in 1873.—See Hilgard's map at page 84 of the Record.

It appeared, from the defendant's evidence, that an approved survey of Arsenal, then Quarantine island, was made by William H. Cozens, in 1853, under the instructions of the U. S. surveyor-general. (Record p. 96, and plat at p. 112.) Also that said island was assigned by the secretary of the interior to the St. Louis public schools in 1863 and 1864. The first assignment bears date February 10, 1863, and covers 109.92 acres of the island; the second assignment is dated September 8, 1864, and conveys 9.65 acres. The two assignments embrace the entire island, which contained 119.57 acres. (Record pp. 85, 86.) Also that said island was sold and conveyed by the public schools for the sum of $33,000, to the city of St. Louis in 1866. (Record p. 86.) Also that surveys of the island were made in 1853, 1863, 1881 and 1883, showing its location at these various periods. (See plats at p. 112.) Witnesses were produced who had known the island as early as 1847. The island was originally in the city of St. Louis and State of Missouri, opposite the arsenal and west of the main channel of the river and of the center thread of the river. It has moved south and westwardly. The change effected in the location of the island since 1847 has been gradual in its character, and has been caused by the action of the water of the river washing the head of the island and adding new ground to the foot thereof. The city of St. Louis has been in possession of the island from 1850 to the present time. The defendant Seeger occupies the island as the tenant of the city of St. Louis. He cultivates the land and resides thereon. Since 1847 Arsenal island has always existed as an island in the Mississippi

river. The island existing at the commencement of this action is the same island that existed in 1847, except that its location has changed as above stated, and it has become attached to the Illinois shore in the manner hereinafter stated. At no time has the island ceased to exist. Prior to 1874 the navigable channel of the Mississippi river was between Arsenal island and the Illinois shore. In 1874 boats commenced navigating between the island and the Missouri shore. (Record p. 89.) In or about the years 1878 to 1882, the United States government caused to be constructed a stone dyke leading from the head of the island to the Illinois shore, and a dam south of the dyke, between the island and the Illinois shore. (Record p. 97.) The effect of these structures has been to stop the flow of water at low water between the island and the Illinois shore. The island is opposite to and in front of the Prairie du Pont common fields. During the yearly stage of high water, the water flows between the island and the Illinois shore; and at the date of the trial, July 5, 1888, it was so flowing.—Record p. 65.

The defendants below moved the court to give the following declarations of law, all of which were refused, and defendants duly excepted:

Defendants' Refused Declarations of Law.

1. The court declares the law to be that under the facts in this cause the plaintiff has shown no title to the premises known as Arsenal Island at and prior to the commencement of this action, and the judgment, therefore, must be for the defendants.

2. The court declares the law to be that under the facts in this cause the plaintiff has exhibited no title to the bed of the Mississippi river beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie Du Pont.

3. The court declares the law to be that under the facts in this cause Arsenal Island is not an accretion to plaintiff's land and the plaintiff has no claim to the ownership of said island or any part thereof under the law of accretion.

4. The court declares the law to be that the title to Arsenal Island held by the city of St. Louis under the United States and the possession of said premises by said defendant, extending from 1850 to the present time, have not been divested by the movement of the island in the Mississippi river.

5. The court declares the law to be that the deed of August A. Blumenthal and wife to Edward Rutz and others, introduced in evidence, did not convey title to the bed of the Mississippi river beyond low-water mark in front of surveys 149 to 156, inclusive, of the common fields of Prairie Du Pont, except to the accretion or sand-bar lying northwestwardly and between the extended lines of said surveys.

6. The court declares the law to be that if the property known as Arsenal Island was granted by the United States to the public schools of the city of St. Louis, and that at the time of such grant the same was an island in the Mississippi river situate in the State of Missouri, then the ownership of accretions attaching themselves to such island while said island remained in said State is governed by the laws of the State of Missouri; and if said island was situated entirely upstream a mile or two miles north of the northernmost point of land of the plaintiff fronting on the Mississippi river, and if accretions thereupon formed at the lower or down-stream end of said island in said State until they reached a point opposite to or in front of the river front of the plaintiff's land or between the extended lines of his surveys 149 to 156 described in the declaration, such accretions became and were the property of the owner of the island shore to which they had become attached, and the title of such owner is not divested by the fact that the navigable channel of the Mississippi river changed its course so as to run between said island and the eastern shore of the State of Missouri, and the further fact that by means of a dyke and a dam run out from the east shore of the Mississippi river (the Illinois shore) said island has become attached to the Illinois shore, and the intervening space has been filled up by deposits of mud, so that, except in high stages of water, there is no water running between said island and the Illinois shore of said river.

7. The court declares the law to be that if the current of the Mississippi river undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi river, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was changed, that thereby the west boundary line of the land of the plaintiff or of his grantor changed accordingly [redacted] to correspond with the changes in the bed and center thread of said river opposite said land.

8. The court declares the law to be that the boundary line between the States of Illinois and Missouri is the center thread of the Mississippi river.

9. The court declares the law to be that if accretions formed and attached themselves to the down-stream end of Arsenal Island, in the State of Missouri, and thereafter other accretions attached themselves to the first-mentioned accretions on the east side of the island, towards the Illinois shore, that the last-mentioned accretions belong to the owner of the first accretions, notwithstanding they extended eastwardly of the center thread of the river.

10. The court declares the law to be that if a sand-bar extended southwestwardly from the foot of Arsenal Island, in the State of Missouri, and subsequently accretions attached themselves to the east side of said sand-bar and extended eastwardly across the center thread of the river into the State of Illinois, the owner of the island was and is the owner of said sand-bar and said accretions.

11. The court declares the law to be that if the current of the Mississippi river gradually undermined the west shore or bank of the land of the plaintiff or of his grantor, Blumenthal, fronting on the Mississippi river, and that by reason thereof perceptible pieces of the shores and banks of said land fell into the river and were washed away, whereby the bed of the river was gradually changed, that thereby the western boundary line of the land of the plaintiff or of said grantor changed accordingly to correspond with the changes in the bed and center thread of the river opposite said land.

No declaration of law was given by the court except so far as the same may be included in the following findings of the court.— Record pp. 115, 116, 117.

The court below made the following findings of fact against the objection of defendants, who then and there duly excepted:

Findings of Fact by the Court.

1. That in the years 1849 and 1850 one August A. Blumenthal acquired, by deeds from the parties then in actual possession of said premises as the owners thereof, the title in fee to surveys numbered 149, 150, 151, 152, 153, 154, 155, and 156, of the common fields of Prairie Du Pont, in the county of St. Clair, in the State of Illinois, and that Edward Rutz, the plaintiff in this suit, acquired from said Blumenthal his said title to said land prior to the commencement of this suit.

2. That the map or plat made by G. F. Hilgard, county surveyor of St. Clair county, Illinois, produced in evidence and marked, "Plaintiff's Exhibit B," is a correct map and plat of the said premises and the several surveys and lines indicated thereon; which said map is hereby included in and made a part of these findings and to which reference is made for greater certainty.

3. That, as appears from the evidence and plats read and produced in evidence, the said surveys numbered 149, 150, 151, 152, 155, are each one arpent (or about twelve rods) in width, and the said surveys 153 and 154 are each two arpents (or about twenty-four rods) in width, and that the said survey numbered 156 is three arpents (or about thirty-six rods) in width, and that said several surveys adjoin each other and lie side by side in the order the same are respectively numbered, survey 149 being upon the extreme northerly and survey 156 being upon the extreme southerly side of the entire tract, and that each and all of said surveys extended to and were bounded by the Mississippi river on the northwesterly ends thereof and extend southeasterly from the Mississippi river, the average distance of about one thousand rods, to the hills or bluffs on the Illinois side of said river.

4. That said Blumenthal, under said deeds to him, whereby he acquired title to said surveys, in the year 1850 entered upon and took the actual possession of said surveys, including as a part thereof the accretions thereto formed on the river front of said surveys embraced within the side lines of said surveys, extended without deflection in a direct line across such accretions northwesterly to the Mississippi river, and said Blumenthal so held such possession of said premises and paid all taxes thereon each year from January 23d, 1850, to December 23d, 1873, at which said last mentioned time said Blumenthal conveyed 500 acres off from the northwestern end of said premises by deeds to said Edward Rutz and others, whose title the plaintiff acquired in fee on and prior to the 7th day of March, 1883, and thereupon succeeded to said Blumenthal's said title to and possession of said premises; and that the said Blumenthal, from whom the plaintiff so derived such title and possession as aforesaid, and the several owners of the surveys and lands in the said Prairie Du Pont common fields adjoining said surveys 149 to 156, both on the northerly and southerly sides thereof, have each ever since the year 1850 up to the present time claimed, possessed, fenced, enclosed, used and occupied as a part of their said several surveys and lands, respectively, that portion of the said accretions thereto embraced within the side lines of their respective surveys extended without deflection in direct lines northwesterly to said river; and that ever since the year 1849 the several owners of said surveys have by common consent recognized and acted upon such extension of the side lines of their several surveys in a direct course across said accretions to the river as the true and proper boundary and division lines between them in respect to the accretions formed on the river front of said surveys.

5. That the premises described in the declaration and sued for are located at the present time and were at the commencement of this suit eastwardly of the center of the main channel of the Mississippi river and in the county of St. Clair, in the State of Illinois.

6. And the court further finds that, as appears from the evidence and from the survey of said lands made by William L. Deneen as the county surveyor of St. Clair county, Illinois, on November 15th, 1850, produced in evidence at that time, the dry land of said surveys numbered 149 to 156, inclusive, extended westwardly to the line indicated by the words "River bank, 1850, by Deneen," on the map marked "Plaintiff's Exhibit B;" and that the main land of said surveys numbered 149 to 156, inclusive, in the year 1850, extended westwardly over and across and included about sixty rods in width of the lands described in the declaration, to-wit: that portion of said lands lying between the river bank in 1850, as indicated by said Deneen's survey, and the line marked "Old surveyed river bank, 1814," as said lines are respectively designated on said map; and that in the year 1863 the main and dry

lands of the surveys 149 to 156 extended about fifteen chains or sixty rods further westward and beyond the line of the river bank so surveyed by said Deneen in 1850, and that eastern bank of the river in 1863 was about one-half a mile west of the certain dwelling-house hereinafter mentioned, then standing on said survey No. 151, and so continued until the year 1865.

7. That the greater part of the so-called Arsenal Island, which now extends over and is embraced within the boundaries of the lands described in the plaintiff's declaration, is located upon the site of the dry lands of said surveys numbered 149 to 156, inclusive, as the same existed from 1850 to 1865, and that the residue thereof (being about one-eighth of the entire width of the same) is located upon the bed of the Mississippi river as it then existed, and easterly of the thread or middle line of said river.

8. That between the years 1865 and 1873 the river front of the said surveys numbered 149 to 156 was washed away, so that in July, 1873, the river front of said lands only extended to the line marked "River bank, 1873," on said map, and that said river bank thereafter continued to wash away and cave in until it reached the line marked "River bank, 1884," on said map.

9. And the court further finds from the evidence that such washing away of said river bank did not take place slowly and imperceptibly; but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away of said river bank occurred principally at the spring rises or floods of high water in the Mississippi river, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasting from four to eight weeks, before the waters of the river would subside to its ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time; that in the spring of the year 1872 Mr. Augustus A. Blumenthal, Jr., the occupant of the land at the time, lived in the dwelling-house situated on said survey No. 151, and the river had, since the year 1865, so encroached upon the land that the house was then but about four or five hundred feet back from the river bank and water's edge as it then existed. When the spring rise or flood occurred that year the said Blumenthal became alarmed for the safety of his house, and immediately commenced taking said house down and removing the same further from the river bank, and in so doing worked 6 or 8 days in succession, at the expiration of which time the bank had caved in and washed away so rapidly that the bank and waters of the river had approached within a few feet of the foundation of the

house, and before the waters subsided carried away the greater portion of the foundation of the house; and the flood which came in the spring of 1873 carried away the residue of said foundation, with at least 100 feet more of the land; and that such caving in and washing away continued until the building of the dyke at the point indicated on said map on the eastern side of the river above the said lands, which dyke was built by the United States Government in the years 1876 to 1878.

10. That the said washing away of the bank on the front of the said surveys was caused by dykes built by the city of St. Louis on the western side of the river at the points where the same are indicated on said map by causing the current of the river to flow over to and against the eastern shore; that the western bank of the river opposite the plaintiff's said land is rocky, and there appears to have been no material change in that bank since the first survey thereof by the United States Government.

11. The court further finds that in 1853 there existed an alluvial formation or body of land on the western side of the river and near the Missouri shore, then called Quarantine island, which, in that year (1853), was surveyed by William H. Cozens. The location and boundaries of said island are indicated upon said map, the same being shaded red, and having written thereon the words and figures "Quarantine island, also called Arsenal island, as surveyed in 1853." In 1858 the said island, in low water, extended to and adjoined the main land or the western or Missouri side of the river. At some time between the years 1853 and 1863 the greater portion of said Quarantine island washed away, so as only to leave remaining that portion thereof embraced within a second survey thereof made by said Cozens in January, 1863, the location and boundaries of which are indicated upon said map by the words "Survey No. 411 of St. Louis land, school lands, Arsenal island, surveyed in 1863;" the letters and lines thereof being shaded green upon said "Exhibit B."

12. Said Quarantine island, since its survey in 1863, has been called Arsenal island, and at the time of said surveys of said island in 1853 and 1863 the same was situated on the west side of the main channel of the Mississippi river and about a mile higher up the river than the lands described in the declaration, and no part of the same then extended down the river opposite said plaintiff's said lands.

13. On February 10th, 1863, a part of the said island, designated as "Survey No. 411 of St. Louis school lands," containing 109 and twenty-two hundredths acres, was assigned to the St. Louis public schools, in pursuance of the act of Congress of June 13th, 1812, entitled "An act making further provision for the settling claims of land in the Territory of Missouri" (2 U. S. Stat. at Large, p. 748), and of the supplementary act of May 26th, 1824 (4 U. S. Stat. at Large, p. 66), and the residue of said island, as so sur-

veyed in 1863, being nine and sixty-five hundredths acres on the northern end thereof, appears to have been also assigned to said St. Louis public schools on August 25th, 1864, as indemnity for school lands lost in section 16, T. 45 N., range 7 east, of the St. Louis district, Missouri.

14. By deed dated February 8th, 1866, the St. Louis public schools conveyed its right and title to said Quarantine or Arsenal island to the city of St. Louis, which lands are described in such deed as situated "in the county of St. Louis and State of Missouri."

As early as the year 1850 the city of St. Louis occupied said Quarantine or Arsenal island for quarantine purposes, and so continued to occupy the same until the year 1875, when the said city leased said island to the defendant, Benjamin Seeger, tenant, lived on and occupied the said island up to the commencement of this suit. During the years 1861 to [illegible]ve, the United States Government occupied a portion of said island for the purpose of a military hospital and as a place for the burial of those dying at such hospital. The dry land described in the declaration in this case did not arise or form in the Mississippi river until about the year 1874 and subsequent thereto, the same having, after the year 1865 and prior to 1874, become in part, submerged and washed away in the manner stated in the 8th paragraph of these findings.

15. The court further finds from the evidence that there is not now and was not at the time of the commencement of this suit any land whatever above the surface of the water in said river on the site or within the boundaries of said Quarantine island as so surveyed in 1853 nor upon the site or within the boundaries of said island as so surveyed in 1863, but that the same was subsequently wholly washed away.

16. The court further finds that in the floods in the Mississippi river before mentioned large portions of the upper or northern end of said island washed away; that in such floods a bar formed each year below and joined to the foot of the island, extending down the river for the distance of a quarter of a mile or more; that when the water subsided after such a spring flood the surface of such bar appeared in sight above the surface of the water, but nearly on a level with the water, for the greater length of such bar; that during the first summer after such a bar had formed willows grew upon it, and the flood which occurred the next succeeding spring deposited more sand and soil on the bar, which was retained by the willows, and the bar so formed was thus raised higher in each successive annual flood so long as it was overflowed in high water, and this process was repeated at each succeeding flood by the formation of another bar below that formed by the preceding flood, which in turn was covered with a growth of willows and raised higher by each succeeding flood until it ceased to be overflowed.

17. The court further finds that such bars were not formed by accumulations of sand or soil washed up against the lower end of the island, but by the deposits in times of flood of soil and sediment upon the bed of the river below the island.

18. And the court further finds that before the said island was washed away the main and navigable channel of the Mississippi river was eastwardly of the island, but after the said bar was formed lower down the river in front of the plaintiff's land the main and navigable channel of the river has been and still is on the west side of the said bars or island, and that since the said bars or island had so formed in the river in front of said surveys the boats navigating the river have not run between the bar or island and the bank of the eastern or Illinois shore of the river,

19. The court further finds that in the years 1876 to 1878 the United States Government built a dyke from the eastern or Illinois shore of the river to the bar or island, as it then existed, about sixty rods northerly, or higher up the river than the north line of the plaintiff's said land, and which said dyke is indicated on said map by the line having the word "dyke" written beneath the same.

And that in the years 1878 to 1882 the United States Government built a dam above said dyke from a point near the head of said bar or island to the eastern or Illinois shore on the line designated "dam" on said map; that after said dyke and dam were built the flow of the water through the channel or space occupied by water between the said bar or island which had so formed in front of the river bank of plaintiff's land as it existed at that time was thereby impeded and the channel or space gradually filled up by deposits from the river, so that by the year 1884 the same became dry land from the line in front of said surveys 149 to 156, marked "River bank, 1884," out to the western side of the said bar or island on the northwestern end of said surveys, as indicated on said map, and that the same has since continued to be and is now dry land, except in extremely high water, and that the lands described in the declaration embrace so much thereof as lies westerly of the line marked on said map with the words "Old surveyed river bank, 1814," and easterly of the middle or thread of the main channel of the Mississippi river and between the extended lines of said surveys, as indicated on said map marked "Plaintiff's Exhibit B."

20. The court further finds that the plaintiff is and was on and prior to the first day of January, A. D. 1884, and at the time of the commencement of this suit the owner in fee of said lands described in the first count of the declaration, situated in the county of St. Clair and State of Illinois, and that the defendants are guilty of unlawfully withholding the possession thereof from the plaintiff in manner and form as alleged in the declaration.

21. And that the value of the said lands in controversy in this suit exceeds sixteen thousand dollars. (Record, pp. 117 to 123.)

And judgment was accordingly rendered for plaintiff for the possession of the above-mentioned premises, to which the defendants then and there excepted.

Afterwards and during the term and in due time the defendants moved for a new trial (Record p. 123), which was denied and a writ of error was duly sued out.

21. And that the value of the said lands in controversy in this suit exceeds sixteen thousand dollars.—Record pp. 117 to 123.

And judgment was accordingly rendered for plaintiff for the possession of the above-mentioned premises, to which the defendants then and there excepted.

Afterwards and during the term and in due time the defendants moved for a new trial (Record p. 123), which was denied and a writ of error was duly sued out.

The plaintiffs in error make the following—

Assignment of Errors.

1. The court below erred in holding that the title and ownership of the defendant in error extended to the middle of the main channel of the Mississippi river, and embraced the premises in controversy.

2. The court below erred in refusing to hold that the premises in controversy were an accretion to Arsenal island and the property of the city of St. Louis.

At page 84 of the record is Hilgard's map showing the river bank in front of surveys 149 to 156 of Prairie du Pont Common Fields, in the years 1814, 1850, 1873 and 1884. At page 112 of the record is Cozen's map showing the Mississippi river adjacent to the city of St. Louis, and the location of Arsenal island in the years of 1853 and 1881, and the location of the Common Fields of Prairie du Pont in Illinois, and the dam and dike connecting said island with the Illinois shore, constructed by the United States Government in 1878 and 1882; and following the above is the map of John G. Joyce, showing the location of Arsenal island in the year of 1880, and the location of the Common Fields of Prairie du Pont in Illinois, and the dam connecting said island with the Illinois shore, constructed by the United States Government in 1878.

ARGUMENT.

This is an action of ejectment to recover ground in the State of Illinois in front of the Prairie du Pont Common Fields, between the eastern bank of the Mississippi river, as surveyed by the United States in 1808, and the center thread of said river.

The defendant in error asserts ownership to the western part of surveys 149 to 156, both inclusive, of the Common Fields of Prairie du Pont in St. Clair county, Illinois. By virtue of said ownership, he claims title to the bed of the Mississippi river in front thereof, between the western line of said Common Fields as surveyed in 1808 (then being the eastern bank of the river), and the center thread of the river. His title to said western part of said surveys rests on a conveyance by parties not shown to be owners, made in 1849 to one Blumenthal and payment of taxes thereunder until 1873, when said Blumenthal conveyed to defendant in error, and possession from 1849 to the present day. The defendant in error shows payment of taxes for seven consecutive years and possession of a tract of ground in the Prairie du Pont Common Fields. He has not exhibited a record or paper title to said premises. It does not appear that Dushanau and Lacroix and Pensoneau, who conveyed to Blumenthal in 1849 and 1850 (Record pp. 39, 40), held under Grondine, Allary, Chartran, Gendron, Jarvais and Perry, who were the original confirmees, of surveys 149 to 156, inclusive, of the Prairie du Pont Common Fields. (Record p. 83.) The defendant in error stands on his possession and payment of taxes. Arsenal island having appeared in the Mississippi river in front of said surveys, the defendant in error, in 1884, instituted this action to recover the same. His claim is based on the theory that he is the owner of the bed of the river to the center thread thereof and of all islands and ground appearing thereon.

The judgment below for possession of the premises in controversy, can be supported only on the proposition that the fee of the riparian owner on the Mississippi river, in Illinois, extends to the middle or thread of the river, or so far as the State boundary extends. It must be conceded by our adversaries that the right of defendant in error to recover, derives no support from the doctrine of accretion; or, in other words, that Arsenal island is not an accretion to the Illinois shore. The claim made by the defendant in error, is that his title and ownership extend not only to the bank of the river, but embrace the soil beneath the water as far westwardly as the State line; and if the water recedes or turns aside, or evaporates or disappears, and the soil of the bed of the river becomes dry land—whether this happens slowly and imperceptibly, or suddenly and sensibly, whether from natural or artificial causes, whether by his own act or the act of another—the dry land is his, although not connected with the Illinois shore.

It will be contended herein, on our side, that the bed of the Mississippi river is not the subject of private ownership, and that it is, and must necessarily remain, public property; and that islands and ground appearing thereon, do not belong to the adjacent proprietor on the shore, unless title by accretion can be maintained and supported.

The argument for the plaintiffs in error will embrace, and the writers will endeavor to sustain, the following propositions:

FIRST. UNDER THE LAW OF FRANCE, IN FORCE WHEN THE ORIGINAL GRANT OF THE PRAIRIE DU PONT COMMON FIELDS WAS MADE IN THE YEAR 1722, NO TITLE PASSED BY THE TERMS OF SAID GRANT TO THE BED OF THE MISSISSIPPI RIVER.

SECOND. UNDER A PROPER APPLICATION OF THE DOCTRINES OF THE COMMON LAW, THE TITLE OF THE OWNER OF LAND ON THE MISSISSIPPI RIVER TERMINATES AT THE WATER'S EDGE, AND DOES NOT EXTEND TO THE CENTER OF THE RIVER.

THIRD. UNDER THE TERMS OF THE DEED FROM BLUMENTHAL, THE TITLE OF THE DEFENDANT IN ERROR TERMINATED AT LOW WATER MARK OF THE MISSISSIPPI RIVER.

FOURTH. THE PREMISES IN DISPUTE ARE THE PROPERTY OF THE CITY OF ST. LOUIS.

The above propositions will be considered in the order in which they are stated.

1. The French grant of 1722 conveyed no title to the bed of the Mississippi river.

The application of the civil law to this case arises from the fact that from the year 1682 to the year 1763, the Illinois country, in which the premises in controversy are located, belonged to the kingdom of France, by right of discovery and occupation; and during this period, in the year 1722, the first grant which included the Prairie du Pont common fields, and under which the record title to ground in said common fields is derived, was made.

The historical events hereinafter referred to are matters of public history, of which the court will take judicial notice.

On April 8, 1682, La Salle, at the mouth of the Mississippi river, took possession, for the King of France, of all the country watered by the Mississippi river. He named it Louisiana in honor of Louis XIV. Prior to this time Marquette and Joliet, under authority from France, conducted an expedition in the years 1670 to 1673, through Illinois. In 1680, La Salle, a French explorer, built a fort called Creve Cœur, at a point which is to-day the northeast part of Tazewell county, Illinois, and another at a point which is now in the city of St. Louis. The French villages of Kaskaskia and Cahokia, in Illinois, were founded in 1683. The village of Prairie du Pont was settled by the French in 1760. By the treaty of Paris, of February 10, 1763, at the termination of the war between France and England, all New France, including the Illinois country and Canada, was ceded to Great Britain.

From 1682 to 1763 the Illinois country belonged to France. From 1763 to 1776 it belonged to Great Britain. From 1776 to 1784 it belonged to the State of Virginia. In 1784 it was ceded by Virginia to the United States.

In 1778 the Virginia militia expelled the British forces from the Illinois country, and in the same year the Virginia Legislature formed it into a county of that name. It was embraced in the Northwest territory, which was ceded by Virginia, in 1784, to the United States, out of which the States of Ohio, Indiana, Illinois and Michigan were created. The ordinance establishing the Northwest territory was passed by Congress on July 13, 1787, and is printed in the first volume of the United States Statutes at Large, page 51. The Northwest territory was divided by act of Congress, of May 7, 1800, and the western section was called Indiana Territory. Indiana Territory included the Illinois country. On February 23, 1809, the Territory of Illinois was established, and in 1818, Illinois was received as a State into the Union. Up to the year 1763, and so long as the Illinois country belonged to the King of France, the laws of France were recognized and governed all property rights.

In 1722, when the first grant which included the Prairie du Pont Common Fields was made, the laws of France, consisting of the customs of Paris and the ordinances of the King, had been extended over the Mississippi valley.

The seventh article of the charter of Louis XIV. to Crozat, bearing date September 14, 1712, is in these words: "Our edicts, ordinances and customs, and the usages of the mayoralty and shrievality of Paris, shall be observed for laws and customs in the said country of Louisiana." 2. Public Lands, Ap. 1, p. 159. Printed in 1828 by order of the House of Representatives.

As to the law of France, Pothier says: "By our French law the alluvions formed on the borders of navigable streams and rivers belong to the king. The proprietors of riparian heritages can have no claim to them, unless they have evidences of the grant made to them by the king, of the right of alluvion along their heritages." Pothier, Part 1, c. 2, § 3, Art. 2.

Guyot, in the "Repertoire Universal de Jurisprudence," a work of authority, says: "According to our principles, navigable streams, their bed and banks, and all the grounds which may be formed in these, belong to the king, in right of his sovereignty."

In 1722 when a tract of four leagues of land square, bounded on the west by the Mississippi river, including the adjacent islands, was granted by the French government to the missionaries of Cahokia and Tamarois, the grant did not include, under the French law then in force, the bed of the Mississippi river. The grant terminated at the water's edge. The bed of the Mississippi river, being the bed of a navigable stream, remained the property of the King of France. No title to the bed of the river passed to the grantees under said grant. The grant included in terms, the adjacent islands. If the grant extended to the center of the river it embraced the adjacent islands resting on the bed of river, and no necessity existed for specifying such islands. The term "adjacent

islands," used in the grant, applied to islands then in existence, and had no reference to islands that should thereafter make their appearance.

On May 6, 1776, the colony of Virginia declared itself an independent State. The Mississippi river under the terms of the treaty of 1763, between Great Britain and France, was the western boundary of the Virginia colony. It remained the western boundary of the State of Virginia. In 1778 the Virginia militia expelled the British forces from the Illinois country. The Illinois country was within the territorial limits of the colony of Virginia as established by letters patent of May 28, 1609, and as curtailed by the treaty of 1763. In 1784 Virginia ceded the Northwest territory, which included the Illinois country, to the United States on certain conditions which were accepted by the United States, among which conditions was the following: "That the French and Canadian inhabitants, and other settlers of Kaskaskia, St. Vincent and the neighboring villages, who have professed themselves citizens of Virginia, shall have their possessions and titles confirmed to them, and be protected in the enjoyment of their rights and liberties."

The ordinance for the government of the Northwest territory, adopted by congress on July 13, 1787, reserved to the French inhabitants their laws and customs then in force among them, relative to the descent and conveyance of property. At this time the French laws and customs had not been abrogated by any former authority. They are spoken of by congress in the above ordinance of 1787, as then existing and in force, and they are preserved to the French inhabitants by said ordinance.

The Prairie du Pont Common Fields which were embraced in the above grant, were surveyed and platted in 1808 by U. S. surveyor Rector, and his field notes disclose that he adopted the eastern shore of the Mississippi river as the western boundary of the common fields. The common fields were confirmed by act of congress of February 20, 1812, to the claimants "according to their respective rights thereto."—2 U. S. Stat. at Large, at p. 678.

They were confirmed as surveyed, namely, to the bank of the river. In 1812, when the title to the common fields became a completed title, by the survey and confirmation of the United States, it was a completed title to the ground embraced in the concession made by France in 1722, as surveyed by Rector in 1808. In other words, the United States in 1812 confirmed the land granted in 1722, as designated on the earth's surface by the survey of 1808, and no other land. (Kissell *v.* Schools, 18 How. 19.) The United States did not part with their title to any land other than the land granted by the French government in 1722. The bed of the Mississippi river that under the grant in 1722 and the law of France, then in force, was the property of the king of France, and passed to the English colony of Virginia, and thence to the State of Virginia, and by cession was lodged in the United States, and

remained in the United States after the confirmation of 1812, unaffected by said confirmation.

The judgment below awards this property, public in its character, and covered by the waters of the Mississippi, to the defendant in error. Property covered by the waters of a public navigable river is not susceptible of private ownership. The title to such property must of necessity remain in the public. The Illinois supreme court possessed no authority to grant said property to a private owner, nor to move the western boundary of the French concession westwardly from its location as surveyed and marked out by the United States surveyor in 1808, so as to embrace the bed of the river to the center of the stream. As to the effect of such survey, see Kissell *v.* Schools, 18 How. 19, above cited.

It is true that the supreme court of Illinois has propounded a line of decisions commencing, in 1842, with Middleton *v.* Pritchard, 3 Scam. (4 Ill.) 510, and extending to the present time, to the effect that the title of a proprietor on the Mississippi river extends to the center of the stream. The decisions are clearly wrong and are subject to be repudiated by this court. The Illinois court cannot extend the boundaries of a surveyed and confirmed French grant; nor can it dispose of public property belonging to the United States or the State of Illinois. It is powerless to accomplish these matters. They belong to the legislative department of the government, not to the judicial branch.

2. *A proper application of the doctrines of the common law limits the title of the owner of land on the Mississippi river to the water's edge.*

Under a proper application of the doctrines of the common law, the title of the owner of land on the Mississippi river, terminates at the water edge, and does not extend to the center of the river. The Mississippi river, according to the common law rightly interpreted, is a navigable stream and the rights of riparian owners do not extend beyond the banks of the river.

The Mississippi is a public navigable river and has been so considered in all treaty stipulations concerning it. By the 7th article of the treaty of Paris of 1763 between Great Britain and France, the boundary between the dominions of England and France was fixed by a line drawn along the middle of the Mississippi, from its source to the river Iberville. "It being well understood," continues the treaty, "that the navigation of the Mississippi river shall be equally free, as well to the subjects of Great Britain as to those of France, in its whole breadth and length from its source to the sea. It is further stipulated, that the vessels belonging to the subjects of either nation shall not be stopped, visited, or subjected to the payment of any duty whatever." 2 Public Lands, Ap. 1, p. 258.

The treaty between Great Britain and the United States which was signed at Paris on September 3, 1783, declared in the 8th article that "the navigation of the Mississippi river from its source to the ocean shall forever remain free and open to the subjects of Great Britain, and the citizens of the United States." 1 Public Lands, p. 9.

The Mississippi river, by the treaties of 1763 and 1783, acquired the character of a public navigable stream, to forever remain free and open as a highway of nations. In the 5th article of the Jay treaty, signed at London, November 19, 1794, it is stipulated that the Mississippi river shall, according to the treaty of peace, be entirely open to both parties, and that all the ports and places on its eastern side, to whichever of the parties belonging, may freely be resorted to and used by the parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his majesty in Great Britain. 1 Public Lands, p. 13.

By the fourth article of the treaty with Spain, dated October 27, 1795, it is agreed that the western boundary of the United States, which separates them from the Spanish colony of Louisiana, is in the middle of the channel, or bed of the river Mississippi, from the northern boundary of said States to the completion of the 31st degree of latitude north of the equator; and it is agreed, that the navigation of the said river, in its whole breadth, from its source to the ocean, shall be free to the subjects of Spain and the citizens of the United States, and to the subjects of other powers by special convention. 1 Public Lands, p. 45.

By the treaty of cession dated at Paris, April 30, 1803, the Mississippi river was thrown entirely within the jurisdiction of the United States, but it was stipulated in the 7th article that the ships of France and the ships of Spain coming direct from those countries or their colonies, should for twelve years be admitted into the port of New Orleans, and all other legal ports of entry, within the ceded territory, in the same manner as the ships of the United States. 1 Public Lands, p. 41.

The treaty of 1763 was between France and Great Britain; the treaty of 1783 between France, Great Britain and the United States; the treaty of 1794, between Great Britain and the United States; the treaty of 1795, between the United States and Spain; and the treaty of 1803, between the United States and France.

In all these treaties the Mississippi river was an object of solicitude and negotiation, and the treaties stamped on it the characteristics of a public navigable river and spoke of its ports in the same sense as those on the Atlantic coast, or the bays and salt water streams.

The same spirit pervades the legislation of congress in creating new states on the Mississippi. The act of April 8, 1812, admitting Louisiana into the Union, provides: "That it shall be taken as a condition upon which the said state is incorporated into the Union,

that the river Mississippi and the navigable rivers and waters leading into the same and the Gulf of Mexico, shall be common highways, and forever free, as well to the inhabitants of said state as of the other states and territories of the United States, without any tax, duty, impost or toll therefor imposed by said state; and that the above conditions, etc., shall be considered, deemed and taken as fundamental conditions and terms, upon which said state is incorporated into the Union."

Similar conditions were imposed on the people of Mississippi, Illinois, Missouri and Arkansas, when they were authorized to form themselves into states on an equal footing with the original states.

The ordinance of 1787, establishing the Northwest territory, declares that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free."

The act of Congress of May 18, 1876, providing for the sale of lands in the Northwest territory, provides in section 9: "That all the navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways. And that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both." The conditions of the ninth section of the act of May 18, 1796, are extended to the Illinois territory, by the fifth section of the act of March 26, 1804.

In R. R. Co. *v.* Schurmeier, 7 Wall. 272, it was held that the title to lands bordering on the Mississippi river, derived from the United States, stopped at the stream; affirming the judgment of the supreme court of Minnesota, in Schurmeier *v.* R. R., 10 Minn. 82.

In Barney *v.* Keokuk, 94 U. S. 324, the court held that in Iowa the riparian proprietor on the Mississippi river extended only to high water mark; approving McManus *v.* Carmichael, 3 Clarke (Iowa), 1, in which last-mentioned case, the court held that the Mississippi river was a navigable stream. See, also, Rundle *v.* Delaware, 14 How. 80; The Daniel Ball, 10 Wall. 557; The Montebello, 20 Wall. 430.

The same rule was applied to the great inland rivers of Pennsylvania, in Carson *v.* Blazar, 2 Binney, 475, where it was held that the owners of land on the banks of such rivers acquire no right to the soil covered by the waters of the river, but the soil and waters remain public. The same rule was applied in South Carolina, in Cates *v.* Wadlington, 1 McCord (Law.), 580. Also in North Carolina, in Wilson *v.* Forbes, 2 Devereux, 30.

In Alabama, the rule is that every water course, suited to the ordinary purposes of navigation, whether the tide ebbs and flows or not, is a public highway, and the riparian owner cannot assert any private right of soil to the bed of the river beyond the low water mark. Bullock *v.* Wilson, 2 Porter, 436.

In Elder *v.* Burrus, 6 Humph. 358, the supreme court of Tennessee followed the North Carolina decision, and held that the owner of land on a navigable stream above tide water, had title only to ordinary low water mark, and not to the center of the stream.

Chancellor Walworth, of New York, in Canal Commissioners *v.* The People, 5 Wendell, 423, says: "It is therefore preposterous to contend that the limited doctrines of the common law are applicable to the Mississippi, Ohio, Susquehanna, Niagara and St. Lawrence." And one of the ablest decisions ever rendered on the question, and where the technical common law rule was emphatically rejected, is People *v.* Canal Appraisers, 33 N. Y. 461.

In Missouri, in Benson *v.* Morrow, 61 Mo. 345, it is held that under the acts of congress and the decisions of the United States supreme court, the ancient doctrine distinguishing navigable and non-navigable rivers by their position above or below tide water is done away with, and the Missouri river is a navigable stream, and the proprietor of land on its banks owns only to the water's edge.

Since Magna Charta, the King of England has had no power to grant to a subject a portion of the soil covered by the navigable waters of the kingdom. Martin *v.* Waddell, 16 Peters (41 U. S.) at p. 410. This is the rule of the common law.

The cases of Jones *v.* Soulard, 24 How. 65; St. Clair *v.* Lovingston, 23 Wall, 46; and St. Louis *v.* Myers, 113 U. S. 566, decided by this court, in no manner modify or limit the doctrine that the title of a riparian owner on the Mississippi, extends only to the water's edge, and not to the center of the stream. The first two cases apply the doctrine of accretion to lands fronting on the Mississippi river. It is manifest that the doctrine of accretion has no application to lands bordering on a stream where the owner's title extends to the center of the stream. In such case the owner takes the ground forming in front of his land by virtue of his ownership of the bed of the stream, and not under the law of accretion. Accretion only applies where the title of the riparian proprieter is bounded by the water's edge. Swayne, J., delivering the opinion of the court in St. Clair *v.* Lovingston, had this in view when he used these words: "Whether in the present case the limit of the land was low water, or the middle thread of the river, is a question which does not arise, and to which we have given no consideration. The point was considered in R. R. Co. *v.* Schurmeier, 7 Wall, 287." The case of St. Louis *v.* Myers, related to the destruction of a water privilege, and in no manner touched the ownership of the bed of the Mississippi river.

3. *The defendant in error exhibited no title to the bed of the Mississippi river west of low water mark in front of surveys 149 to 156 inclusive of the common fields of Prairie du Pont.*

The doctrine adopted by the supreme court of Illinois in 1842, in Middleton *v.* Pritchard, 3 Scam. 519, and followed to the present day, is that grants of land on the Mississippi river carry the exclusive right and title of the grantee to the center of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river. In Piper *v.* Connelly, 108 Ill. 646, it is said: "The general doctrine, that grants of land bounded upon rivers or the margin, above tide water carry the exclusive right and title of the grantee, to the center thread of the current unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long established, and too firmly adhered to by this court, to be now questioned." The above statement of the law is quoted and approved in Butternuth *v.* St. Louis Bridge Co., 123 Ill. 535.

The defendant in error is limited as to ownership by the deed of Blumenthal, of December 23, 1873. Record page 40. The description in the Blumenthal deed covers a part of surveys 149, 150, 151, 152, 153, 154, 155 and 156, and defines said part by specific courses and distances; and the northwestern boundary of the land so conveyed is expressed to be the low water mark of the Mississippi river. The language of the deed as to this boundary is as follows: "Thence, along the extended line between surveys number 148 and 149, N. 33½ degrees W. to low water mark of the Mississippi river; thence down to the extended line between surveys number 156 and 157; thence S. 33½ degrees E. to the point of beginning." The river front of the land is bounded by low water mark. The deed clearly denotes the intention to limit the plaintiff's title to the edge of the river. The possession of Blumenthal never extended beyond the water's edge, page 62 of Record. In addition to the specific territory described in the deed, the instrument proceeds to convey "all rights as riparian owner to the accretion or sand bar lying northwestardly, and between the extended lines of said land herein described, situated in the county of St. Clair and State of Illinois." This additional grant is a clear demonstration that the bed of the river between low water mark and the center thread thereof, was not embraced in the terms of the Blumenthal deed. If plaintifftook title to the bed of the river by said deed, it was a work of supererogation to grant him the accretion or sand bar lying thereon. No identity is shown between the "accretion or sand bar" here spoken of, and Arsenal island. There is no testimony that Arsenal island was ever spoken of as an "accretion or sand bar;" on the contrary, it was established that from 1847 to the present time it has always been known as Quarantine, or Arsenal island. And when Blumenthal made the above deed, in 1873 and up to 1874, the navigable

channel of the Mississippi river was between the island and the Illinois shore, and the island was not in St. Clair county, Illinois. Testimony of James Kelly, page 89 of Record. Arsenal island was then in the State of Missouri. The "accretion or sand bar" referred to was no doubt the Cahokia bar mentioned by A. A. Blumenthal, Jr., at page 65 of the Record. It is to be observed that although Dushanau and Lacroix and Pensoneau conveyed to Blumenthal surveys 149 to 156 inclusive, of Prairie du Pont Common Fields, Blumenthal conveyed to plaintiff only a part of said property and he gave a specific description by boundaries, courses and distances of the part so conveyed, and excluded therefrom the bed of the Mississippi river between low water mark and the center thread of the stream. If Blumenthal had title to the bed of the Mississippi river west of low water mark, he has not parted with it, and it is still in his representatives. It has never reached the plaintiff, The plaintiff has shown no title to the bed of the Mississippi river west of low water mark, and no title to Arsenal island as an island appearing thereon in front of his property.

In Gould on Waters, sections 199, 200, it is said that if the conveyance does not bound the land by the water, but refers to the shore or the land under the water as the boundary, it does not pass such shore or land. Upon the same principle, a deed conveying land adjoining a private fresh water stream may so refer to the bank or margin of the water as to make that a monument. Thus, in Hatch *v.* Dwight, 17 Mass. 289, the description was: Beginning at the end of a dam, running up the river two rods, and so round to the bank of the river; and it was held that the bed of the stream did not pass. In Bradford *vs.* Cressy, 45 Maine 9, where a line was run to a creek, thence on "the west bank of said creek," the river was held to be excluded. So, in Child *v.* Starr, 4 Hill (N. Y.), 369, it was held that a boundary line running "eastwardly to the Genessee river, thence northwardly along the shore of said river," conveyed no part of the bed of the stream beyond low water mark, the controlling words being "along the shore of said river." In Lamb *v.* Ricket, 11 Ohio, 311, the deed called for a corner on the bank of a stream, thence south, thence east, thence north to the bank of the stream, "and with the course of the bank to the place of beginning," and the low water mark of the stream was held to e the boundary. In Rockwell *v.* Baldwin, 53 Ill. 19, boundaries "to the west side of Cedar creek, thence down the west line of said creek to the north line of said quarter section" were held to be limited to the bank of the creek. In Cook *v.* McClure, 58 N. Y. 437, it was held that a line commencing at "a stake near the high water mark" of an artificial pond and running thence "along the high water mark of said pond to the upper end of said pond," was a fixed boundary, and that the grantee could not claim accretions.

In the present case the description is: "Thence along this line N. 33½°, W. 142 51-100 chains to the present bank of the Missis-

sippi river; thence along the extended line between surveys number 148, 149, N. 33½°, W. to low water mark of the Mississippi river; thence down (low water mark) to the extended line between surveys number 156, 157; thence S. 33½, E. to the point of beginning." (Record pp. 40, 41.) The above description manifestly and clearly excludes the bed of the river between low water mark and the thread of the stream.

4. *The premises in dispute are the property of the city of St. Louis.*

The present location of Arsenal island is due to the action of the currents of the river, and the island, as it now exists, was created by accretion to the original island. It is settled law that land bounded by the Mississippi river is entitled to the accretion attaching to it. New Orleans *v.* U. S., 10 Pet. 662; Jones *v.* Soulard, 24 How. 41; St. Clair County *v.* Lovingston, 23 Wall. 46.

The above doctrine applies to the islands in the river, as well as to the main shore. Benson *v.* Morrow, 61 Mo. 345; Buse *v.* Russell, 86 Mo. 209.

The defendant in error never had title to the bed of the river. When the dry land covered by his possession was swept away by the river and ceased to exist, his ownership of such land also ceased to exist. At all times said ownership was limited to the water's edge. It never extended to the bed of the Mississippi river.

Arsenal island is a distinct, independent and existing body of land, held by the city of St. Louis under a title emanating from the United States and the State of Missouri, and its location to-day is due to accretions forming to the island, and which are the property of the proprietor thereof. Originally the island was within the city of St. Louis, the eastern boundary of which city extends to the middle of the main channel of the Mississippi river. Jones *v.* Soulard, 24 How. 41.

The true rule applicable to this case is the following stated by Napton J., in Benson *v.* Morrow, 61 Mo. at page 353: "Suppose the channel of the river between an island and the mainland is left dry by the water, and entirely filled up with deposits of mud, and the island and the mainland are at last one continuous tract of land, could the owner of either claim the entire tract? Certainly the newly formed land would belong to the United States, or it would be divided between the opposite owners, upon the common law principle, applicable to non-navigable streams, of each going to the thread of the channel, as it was before it was deserted by the water. In the event supposed, the river might be regarded as ceasing to be a navigable one, *pro hac vice*, or rather as being converted, at the slough between the island and the shore, into a non-navigable one. In any event the owner of the shore could not claim both the alluvion and the island, nor *vice versa*, could the owner of the island claim the tract on the bank, with its accessions by alluvion."

The change that has taken place in the location of the island is spoken of in another case between the same parties, Rutz *v.* St. Louis, 3 McCrary Rep. 261, as follows: "Arsenal island under the changing currents has shifted downwards during the last fifty years for two or three miles. As the head of the island is washed away the foot of the island is enlarged. So this island has been gradually traveling southward," etc. The movement of the island has been the result of natural causes, and is an incident that attends lands surrounded by the waters of the Mississippi river. The dyke and dam between the island and the Illinois shore built by the United States goverment, have not effectually closed the channel between the island and the common fields. At the date of the trial, July 5, 1888, the water was running over the dike and dam between the island and the Illinois shore. The stage of water at said date was the ordinary stage of water for that period of the year. This suit was commenced in 1884, and the plaintiff's right to recover is to be determined as of that date. It is shown that four years after the commencement of the action, the water is flowing between Arsenal Island and plaintiff's land on the Illinois shore at the ordinary annual stage of the river for that period of the year. Arsenal Island is a body of land separated from the main shore by running water, at an ordinary yearly stage of the river. The defendant in error has no claim to said island or any part thereof. It is an island of 200 acres and is cultivated. The defendant in error has no title to the premises sued for; he is not the owner of the bed of the river on which Arsenal island has appeared. The judgment should have been for the defendants below. It is sufficient to establish that plaintiff below has no title to the premises sued for to defeat his recovery. The property in question may belong to the United States, or to the State of Missouri, or to the State of Illinois, or to the heirs of A. A. Blumenthal, deceased, or to the representatives of the original confirmees of the Prairie du Pont Common Fields, or to the city of St. Louis. It does not belong to Edward Rutz. This fact settles the case adversely to the defendant in error. The title to Arsenal island, held by the city of St. Louis under the United States, and the possession of said premises by said city extending from 1850 to the present time, have not been divested by the movement of the island in the Mississippi river. The United States parted with their title to Arsenal island by the survey of 1863, and the assignments made to the St. Louis public schools in 1863 and 1864 (Record pp. 85, 86). The survey and assignments are equivalent to a patent. Kissell *v.* Schools, 18 How. 19. The movement of the island has not operated to divest the title of the city of St. Louis, claimed under the United States. Missouri *v.* Kentucky, 78 U. S. 395; Carrack *v.* Lamar, 116 U. S. 423. Speaking of Arsenal island in the last-mentioned case, the court says: "It appears that under acts of Congress, an island situated some distance above the site of the present island, was

surveyed and set apart to the city of St. Louis. It is contended that the present island represents the one surveyed, it having been carried down the river by the action of the current. It certainly would be a matter of doubt, requiring for its solution grave consideration how far the title of the city to the island is affected by this movement."

Surveys 149 to 156 inclusive, of the common fields of Prairie du Pont, terminated at the water's edge. They cannot be extended to the center thread of the Mississippi river. R. R. Co. *v.* Schurmeir, 7 Wall. 272. The plaintiff and his grantors never had title to the bed of the river. When the dry land, originally covered by said surveys, was swept away by the river, and ceased to exist, their ownership of such land also ceased to exist. At all times the ownership of plaintiff and his grantors was limited to the water's edge. It never extended to the bed of the Mississippi river.

By act of March 3, 1851, printed in the laws of Missouri, 1850, 1, page 573, the State of Missouri conveyed all its right, title, interest and claim in and to Quarantine island to the city of St. Louis. The language of the act is as follows: "That all the right, title, interest and claim of the State of Missouri, * * * * in and to those two certain islands in the Mississippi river, in the county of St. Louis, the one called and known as Duncan's island, * * * * * the other called and known as Quarantine island, lying below said city, and being the same now occupied and used by said city authorities for quarantine purposes, is hereby transferred, set over and conveyed to said city of St. Louis."

The above is a public act, and although not read in evidence, the court will take judicial notice of it. The courts of the United States take judicial notice of all the public laws of the several states. Elwood *v.* Flannigan, 14 Otto, 562. The city of St. Louis, in 1851, acquired the title of the State of Missouri to Arsenal island, and in 1866, the title of the United States thereto. At said times, the island was unquestionably in the State of Missouri, and it belonged either to the State of Missouri or the United States. The city of St. Louis obtained conveyances from both, and it has been in undisturbed possession of the island from 1850 to the present time. Its title and possession are not divested by the movement that has taken place in the island.

In a case decided here during the present year, Jefferis *v.* Land Company, 134 U. S. 178, it is held that the general law of accretion is applicable to land on the Mississippi and Missouri rivers. This view excludes the idea that the bed of said rivers is the property of the adjoining proprietors fronting thereon. It overthrows the rule of the supreme court of Illinois that has prevailed in that State from 1842 to the present day on the subject. It decides the present controversy in favor of the plaintiffs in error.

The case also decides that the water line is the boundary of a lot fronting on the river, and remains the boundary no matter how

it shifts, and the conveyance of the land conveys the accretion thereto.

It is a matter of which the court will take judicial cognizance that it is seldom that accretion on the Mississippi and Missouri rivers is imperceptible. Bottom lands are added to, or swept away by the acre. This fact makes no change in the rule. The proprietor always holds to the water line; no more, no less.

There is practically no dispute as to the facts and it is submitted that the judgment below should be reversed and the cause remanded with instructions to enter judgment for the plaintiffs in error.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1890.

No. 1096.

CITY OF ST. LOUIS,
Surviving Plaintiff in Error of Benjamin Seeger, deceased,
vs.
EDWARD RUTZ,
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

BRIEF AND ARGUMENT

FOR DEFENDANT IN ERROR.

JAMES K. EDSALL,
ATTORNEY FOR DEFENDANT IN ERROR.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1890.

No. 1096.

CITY OF ST. LOUIS,
Surviving Plaintiff in Error of Benjamin Seeger, deceased,
vs.
EDWARD RUTZ,
Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF CASE.

This was an action of ejectment brought in the Circuit court of St. Clair county in the State of Illinois, January 29, 1884, by Edward Rutz, the plaintiff below, against Benjamin Seeger, the tenant in possession, to recover certain land described in the declaration by metes and bounds in accordance with the surveyor's field notes, but for the present purposes, may with sufficient accuracy, be more briefly described as that part of surveys numbered 149 to 156, inclusive, in Prairie du Pont Common Fields in St. Clair county, Illinois, as follows:

Bounded south-easterly by the meanders of the original bank of the Mississippi river as surveyed by the United States government in surveying said common fields of Prairie du Pont;

bounded north-westerly by the center thread of the Mississippi river; bounded north-easterly by the north-east line of survey 149, aforesaid, produced north-westwardly to the center thread of the Mississippi river; and south-westerly by the south-westerly line of survey 156 aforesaid, produced north-westwardly to the center thread of the Mississippi river. (Printed Rec., p. 3.)

The general question involved in the case was whether the land in dispute was a part of said surveys, 149 to 156, inclusive, in Prairie du Pont common fields, with the accretion thereto, situate on the Illinois side of the Mississippi, in St. Clair county, Illinois, owned by the plaintiff, below; or whether it was owned by the city of St. Louis, as an accretion to, and a part of an island in the city of St. Louis on the western or Missouri side of the Mississippi, and more than a mile higher up the river than the surveys in question.

On its own motion the city of St. Louis was made a defendant in the suit as the landlord of said Seeger, its tenant in possession, and by his consent said city was given the sole control and direction of the suit. (*Id.*, 6 and 7.)

On the petition of the defendants the cause was removed into the Circuit court of the United States, for the Southern district of Illinois. (*Id.*, 13–25.)

A jury was waived, and the cause was heard by the court (Judge Gresham presiding) November 10, 1887, and taken under advisement. (*Id.*, 27.) Afterwards, on February 11, 1888, the court found "the issues for the plaintiff; that the "plaintiff is seized of an estate in fee of the premises described "in the declaration," (by metes and bounds,) "and that the "defendants are guilty of wrongfully withholding the possession "thereof from the plaintiff, as alleged in the declaration;" and the court also found a special finding as to the facts, and entered judgment thereon for the plaintiff. (*Id.*, 29–35.)

On April 17, 1888, the defendants paid the costs and took a new trial under the statute. (*Id.*, 36.)

On July 5, 1888, a jury trial was again waived by the written stipulation of the parties, and the cause was again submitted to the court for trial, and heard before the Hon. William J. Allen, the district judge, and taken under advisement until April 1, 1889, when the record recites thus:

"And the court having heretofore heard the evidence offered "by the respective parties, and the arguments of counsel "thereon of the several parties, and taken the same under ad- "visement, and being now sufficiently advised in the premises, "the court finds that the defendants are guilty of unlawfully "withholding from the plaintiff the certain land and premises "described in the first count of the declaration, situated in the "county of St. Clair, in the State of Illinois, to wit" (here follows description contained in first count): "and that the "plaintiff, at the time alleged in the declaration, owned, and "now owns, said lands in fee, in manner and form as alleged "in the declaration." And thereupon the court entered judgment for the plaintiff for said land in due form, and awarded a writ of possession therefor. (*Id.*, 37, 38.)

Afterwards, on the 10th day of April, 1889, the defendants filed a motion for a new trial (*Id.*, p. 123), which motion was overruled by the court, November 4, 1889; and the defendants thereupon filed a bill of exceptions in the cause, setting out at large the evidence in the case, which concluded with the finding of facts by the court, set out at large in the printed record, pages 117 to 123; and in addition to the special findings there was a general finding by the court upon all the facts, in these words:

"20. The court further finds that the plaintiff is, and was, "on and prior to the first day of January, A. D., 1884, and at

" at the time of the commencement of this suit, the owner in " fee of said lands, described in the first count of the declara- " tion, situated in the county of St. Clair, and State of Illinois, " and that the defendants are guilty of unlawfully witholding " the possession thereof from the plaintiff, in manner and form, " as alleged in the declaration." (*Id.*, p. 122.)

The defendants sued out the pending writ of error, November 4, 1889, and the record was filed in this court, January 6, 1890. By stipulation of the parties, a certified copy of the declaration as it had been previously amended in the court below, correcting certain clerical errors, was filed in this court, March 17, 1890.

A suggestion has been filed in this court, showing the death of said Benjamin Seeger, during the pendency of this writ of error, and the said city of St. Louis has now become the sole surviving plaintiff in error.

No question of law was raised, or excepted to, in the progress of the trial.

The only exceptions taken by defendants below, appearing in the record, are as follows:

(1.) The refusal of the trial court to find the facts as requested by defendants below, to which a general exception was taken. (Printed Rec., p. 113.)

(2.) The refusal of the court, to give or find as law, on motion of defendants, a series of eleven propositions comprising general conclusions of the court, finding both the law and the facts as proposed; and to the entire series of propositions so refused, a general exception was taken by the defendants. (*Id.*, p. 115.)

(3.) A general exception to the entire series of the findings of fact, found by the court, twenty-one in number. (*Id.*, p. 117.)

(4.) A general exception to the judgment entered for the plaintiff, April 1, 1889. (*Id.*, p. 123.)

(5.) An exception to the overruling defendant's motion for a new trial. (*Id.*, p. 124.)

So far as we can discover, none of these exceptions taken below, have been assigned for error in this court. They are each, obviously, untenable; and do not raise any question for review in this court.

The only assignments of error in this court are as follows:

"1. The court below erred in holding that the title and ownership of the defendant in error extended to the middle of the Mississippi river, and embraced the premises in controversy."

"2. The court below erred in refusing to hold that the premises in controversy, were an accretion to Arsenal island and the property of the city of St. Louis."

(Here follows a reference to certain plats produced in evidence without objection.) Plaintiff in Error's Brief, page 12.

There is nothing in either of these assignments of error which refer to any exception contained in the record, upon which the same are based; and we have carefully examined the record and find no such exception.

For a more explicit statement of the facts of the case, we refer to the findings of fact made by the court, contained in the printed record at pages 117 to 123; and also to the map, marked "Plaintiff's Exhibit B," made a part of such findings of fact, contained between pages 84 and 85 of the printed record.

Brief for Defendant in Error.

I.

As to the Assignments of Error.

1. As to the first assignment of error, we can simply say that we are unable to find in the record any exception by defendants in the court below, to any ruling of that court upon the question specified in that assignment: but, if an exception had been taken to such a ruling, the same would have been clearly untenable for reasons hereinafter stated.

The same is equally true of the second assignment of error. We are unable to find an exception to such a refusal or ruling. No such specific proposition "that the premises in controversy "were an accretion to Arsenal island and the property of "the city of St. Louis," contained in this assignment of error, can be found in any one of the defendant's eleven "Refused Declarations of Law." (Printed Record, pp. 115-117.) And if any such proposition had been submitted as one of these "declarations of law," it would properly have been refused by the Circuit court, because not only unsound in law, but it was wholly unsustained by any of the facts found by that court.

The proposition specified in this second assignment required the court to find all the facts of the case in favor of the defendant's in gross, viz.: "that the premises in controversy *were an* "*accretion to Arsenal island and the property of the city of St.* "*Louis.*"

In cases of this character, this court will not review the action of the trial court upon questions of fact.

Norris v. *Jackson*, 9 Wall., 125, 129.
Martinton v. *Fairbanks*, 112 U. S., 670, and cases there cited at pages 672 to 674.

An assignment of error in this court cannot, therefore, be properly based upon the finding, or refusal to find, any such question of fact.

II.

Upon this Record there arises no question of Law, subject to Review in this Court.

1. When the court below, without a jury, *finds generally* for either party, and also makes *special findings* on the issues, no error can be assigned in this court on the special findings.
Meath v. *Board of Levee Comrs.*, 109 U. S., 268, *271*.

It is accordingly held by this court that: "The general find-"ings prevent all inquiry by us into the special facts and con-"clusions of law on which that finding rests."
Boardman v. *Toffey*, 117 U. S., 271, *272*.
Martinton v. *Fairbanks*, 112 U. S., 670, *673*.
River Bridge Co. v. *Kansas Pac. Ry. Co.*, 92 U. S., 315, *318*.
Cooper v. *Omohundro*, 19 Wall., 65.

And for the same reason, where the findings of the trial court embrace mixed questions of law and fact, no questions can arise thereon for review in this court. *Id.*

No error appears to have been assigned as respects the sufficiency of the findings of fact made by the trial court, and no available error could be assigned thereon for the reason: (1) that the same contains a general finding in favor of the plaintiff below, upon all the issues involved in the pleadings,

and (2) that the special findings of fact not only fully support such general finding but are of themselves alone amply sufficient to sustain the judgment. (Printed Record, pp. 117 to 123.)

2. No available error can arise in this court upon the "Defendant's Refused Declarations of Law," contained in the bill of exceptions. (*Id.*, p. 115.) There appear to have been eleven of such proposed "declarations of law," extending from page 115 to page 117 of the printed record. The entire series were preceded with the following statement and exception:

"The defendants moved the court to give the following "*declarations of law, all of which* were refused by the court, "and defendants duly excepted, then and there, viz:" [Here follows the entire series of the proposed declarations of law.] (*Id.*, p. 115.)

The established rule in this court is that where an entire series of propositions are presented in the aggregate as *one request*, and if any one of the propositions so requested are unsound, an exception to a refusal to charge the series of propositions, cannot be sustained.

Beaver v. *Taylor*, 93 U. S., 46, 54.
Ind. & St. L. R. R. Co. v. *Horst*, 93 U. S., 291, 295.

3. An examination of these several "refused declarations of "law," will show that the same are not simple propositions of law, but chiefly comprise proposed findings of fact, mixed and confused with the conclusions of law thereon. For example, the first of the series is as follows:

"1. The court declares the law to be *that under the facts in this cause* the plaintiff has shown no title to the premises known as Arsenal island, at and prior to the commencement of this action, and the judgment, therefore, must be for the defendants." (Printed Rec., 115.)

No rule of law is here stated. It is a simple request to find upon the entire facts and law of the case combined.

It is unnecessary to cite authorities to show that this court will not reverse the decision of a Circuit court upon a question of fact, or upon mixed questions of law and fact, submitted to the court in an action at law without a jury.

This series of declarations or propositions were, therefore, properly rejected.

So far as any of them contain any sound rule of law, the same were either irrelevant or inapplicable to the facts found by the court, or were properly applied and acted upon by the court in its decision of the case.

Should this court, however, upon these assignments of error, and such exceptions as appear in the record, entertain and consider the questions discussed in the argument for plaintiff in error, then we submit the following points:

III.

The question as to whether the fee of the riparian proprietors on the Mississippi extends to the water's edge, or to the thread of the stream, is a Rule of Property, governed by the local law in each State.

Barney v. *Keokuk*, 94 U. S., 324., *338.*
St. Louis v. *Myers*, 113 U. S., 566.

This is a rule of property in each state.

If any of the several states "choose to resign to the riparian "proprietor rights which properly belong to them in their "sovereign capacity, it is not for others to raise objections."

Barney v. *Keokuk*, *supra.*

IV.

The fee of the riparian owner on the Mississippi River, in Illinois, extends to the "middle of the main channel" of the river.

1. This proposition is firmly established and steadily adhered to in the courts of that state as a rule of property.

Braxon v. *Bressler*, 64 Ill., 488, *493*.
Houck v. *Yates*, 82 Ill., 179.
Village of Brooklyn v. *Smith*, 104 Ill., 429, *438*.
Washington Ice Co. v. *Shorthall*, 101 Ill., 46.
Cobb v. *Lavalle*, 89 Ill., 331, *334*.
Buttenuth v. *St. Louis Bridge Co.*, 123 Ill., 535, *550*.

This rule of law is applied to lands in Illinois the title to which is derived from this old French grant in 1722, to the inhabitants of Cahokia and Prairie du Pont, the same as to other lands in that state.

Cobb v. *Lavalle*, *supra*.
Lavalle v. *Strobell*, 89 Ill., 370.

V.

The Mississippi River was the boundary of the land conveyed to Edward Rutz, under the deed from Blumenthal.

It is an undeniable fact that the surveys in Prairie du Pont common fields, were bounded by the Mississippi river, on the north-west. (Printed Record, 42, 43, 81, 83.)

As appears from the description contained in Blumenthal's deed the land does not terminate at "low water mark" as claimed by plaintiff in error. (Printed Record, 40.)

It is true that the last call on the extended line between surveys 148 and 149, and next before the words descriptive of the river boundary, was a point on the margin of the water, viz.: "To low-water mark of the Mississippi river;" but the call descriptive of the river boundary was, "*thence down to the ex-*"*tended* line between surveys 156 and 157." The call does not say "thence *down* (low-water mark) to the extended line," etc., as quoted by counsel for plaintiff in error, on the 23d page of their argument.

In the case of *County of St. Clair* v. *Lovingston*, 23 Wall. 64, this court held that:

"It may be considered a canon in American jurisprudence "that where the calls in a conveyance of land, are for two "corners *at, in or on* a stream *or its bank*, and there is an inter-"mediate line extending from one such corner to another, "*the stream is the boundary*, unless there is something which "excludes the operation of this rule by showing that the inten-"tion of the parties was otherwise."

3 Washb. Real Prop. (4th Ed.), p. 409, Sec. 46.
Sleeper v. *Laconia*, 60 N. H., 201.
Piper v. *Connolly*, 108 Ill., 646.
Berry v. *Snyder*, 3 Bush. (Ky.), 266.
Cole v. *Wells*, 49 Mich., 450.
Mansur v. *Blake* 62 Maine, 38.
Lowell v. *Robinson*, 16 Maine, 357.
Richardson v. *Prentiss*, 48 Mich., 88.
Angell on Watercourses (7th Ed.), § 29, and notes.
Luce v. *Carley*, 24 Wend. 451.
Cold Spring Iron Works v. *Tolland*, 9 Cush., 495.

In construing this deed, all the words of the description must

be given effect, if possible. The first clause is: "Being the *northwestern part* of surveys" 149 to 156. (Printed Rec., 40.)

Now if Blumenthal retained the ownership of any part of these surveys, northwest of that which he conveyed to plaintiff, it is manifest that he did not convey to him the "northwestern part" of these surveys.

Nor could he have conveyed "all rights as riparian owner to "the *accretion or sand bar* lying northwestwardly, between the "extended lines of said land herein described, situated in the "county of St. Clair, and State of Illinois," if, as contended, the land conveyed did not extend beyond low-water mark. (*Id.* 41.)

This sand bar evidently existed at the date of Blumenthal's deed in December, 1873, as it was therein mentioned; and was evidently the nucleus of the bar which subsequently developed into the land in dispute. (*Id.*pp. 63, 64, 68.)

The deeds for these surveys, by numbers, were of themselves sufficient to include the accretions on the river front.

Jeffries v. *East Omaha Land Co.*, 134 U. S., 178.

VI.

The Washing Away of more than One Half Mile from off the River Front of these Surveys, Suddenly and Perceptibly, in the Annual Floods, between 1865 and 1873, neither changed the Boundaries, nor deprived the Riparian Owner of his fee in the Submrged Land.

It appears from the findings of fact that more than one-half mile of the river front of these surveys, where the land in dispute is now situated, washed away, and the river encroached upon the land in the annual floods, between the years 1865

and 1873; "and that such washing away did not take place "slowly and imperceptibly; but on the contrary, the caving in "and washing away of the same was *rapid and perceptible* "*in its progress.*" (See findings Nos. 6, 7, 8 and 9, Printed Record, 119, and "Exhibit B," *Id.*, 84.)

Chancellor Kent states the general principle thus: "If a "fresh water river, running between the land of separate "owners, *insensibly* gains on one side or the other, the title of "each continues to go *ad filum medium aquæ;* but if the alter- "ation be *sensibly* or *suddenly made*, the ownership remains ac- "cording to the former bounds." 3 Kent's Com. p. *428.

The uniform current of authority is to the same effect.

3 Washb. Real Prop. (4th Ed.), p. 409.
Lynch v. *Allen*, 3 Battle & Dev. (N. Car. Rep.), 62.
Angell on Tide Waters, 265-6.
Phear on Rights of Water, *12, *43.
2 Hilliard on Real Prop., (4th Ed.), 195, § 10.
Gould on Waters, §§ 155, 158, 166.
Schultes on Aquatic Rights, 122.
Hargraves Law Tracts, 15, 29, 36, 37.
Tyler's Law of Boundaries, 74, 76, 79.
Mulry v. *Norton*, 100 N. Y., 424, 434.
Buttenuth v. *St. Louis Bridge Co.*, 123 Ill., 535, 546.

VII.

The owner of the fee of Submerged Land owns all islands or dry lands which form thereon.

All the authorities agree that if an island, or dry land, arises or forms upon that part of the bed of a river owned by the

riparian proprietor in fee, the same becomes, or rather continues to remain, the property of such riparian proprietor.

(See authorities cited in support of last point.)

This is something more than title by accretion. The proprietor simply retains the title to the land previously owned by him with the new deposits thereon.

VIII.

If the title of plaintiff, below, to the land in dispute is not sustained, what has become of his riparian rights on the Mississippi?

It is an indisputable fact that the land of plaintiff, below, originally extended to the Mississippi river, and that he was a riparian proprietor on that river. He is no longer such riparian owner, and is cut off from access to the river if his title to the land, involved in this suit, is not sustained.

"This riparian right is property, and is valuable, and, though "it must be enjoyed in due subjection to the rights of the pub- "lic, it cannot be arbitrarily or capriciously destroyed or im- "paired. It is a right of which, when once vested, the owner "can only be deprived in accordance with established law, and "if necessary that it be taken for the public good, upon due "compensation."

Yates v. *Milwaukee*, 10 Wall., 497, 504.

IX.

The City of St. Louis has acquired no title to the land in dispute.

The land described in the declaration is situated on the eastern side of the Mississippi in the county of St. Clair and State of Illinois. The land to which the city of St. Louis acquired

title is situated on the western side of the Mississippi, more than a mile higher up the river, in the city of St. Louis and State of Missouri.

(See Exhibit B printed record, pages 85, 86, and Findings of Fact Nos. 11, 12, 13 and 14, *id.*, pages 120, 121.)

The only possible claim of the city of St. Louis to the land in question, is based upon the "act making further provisions "for settling claims to land in the Territory of Missouri," of June 13, 1812, and of the subsequent acts relating to the same subject of May 26, 1824, and January 27, 1831.

2 U. S. Stat. at Large, pp. 748–750.
4 U. S. Stat. at Large, p. 66, § 2.
4 U. S. Stat. at Large, p. 435, § 2.

It will be observed that by the terms of these acts the village of St. Louis was only authorized to acquire title to land *within said village in the Territory or State of Missouri.* The village (now city) of St. Louis had no right or power to acquire thereby the title to any lands in the State of Illinois: and could not have directly obtained title to the land in question.

Nor is this land an *accretion* to the land acquired by St. Louis in Missouri, a mile higher up the river. Because:

(1.) The "middle of the *main channel* of the Mississippi "river" is the eastern boundary of the State of Missouri.

3 U. S. Stat. at Large, p. 545, § 2.
Buttenuth v. *St. Louis Bridge Co.*, 123 Ill., 535, *548.*

The land in question has at all times been east of this "mid-"dle of the main channel of the Mississippi." (Finding No. 18, Printed Rec., 122.)

No rule of law has ever been recognized by which title to

land situated and remaining in one state can be transferred by mere *accretion* to a tract of land owned by another proprietor, situate in another state.

The title to land acquired by *accretion* is a title acquired by operation of state law, which each state determines for itself.

Barney v. *Keokuk*, 94 U. S., 337.

The laws of Missouri cannot confer upon the owner of an island situated in that state, the title to land formed by *accretion* or alluvion in the State of Illinois, because the Missouri laws have no operation in Illinois, or upon land situate therein. The laws of Illinois cannot confer upon the owner of an island situate in Missouri the right by *accretion* to land in Illinois, because the laws of Illinois have no operation in the State of Missouri, or upon land situate therein.

It follows, therefore, that the "middle of the main channel "of the Mississippi river," being the boundary line between these states, constitutes a territorial limit to the right of accretion as respects islands situate upon either side of the "middle "of the main channel" of that river.

(2.) These sand bars, which have since developed into what is now called Arsenal Island, appear to have formed *on the bed of the river*, below the original island, about *a quarter of a mile in length* in a single flood of from four to eight weeks duration, and "that when the water subsided * * * such "bar appeared in sight above the surface of the water, but "nearly on a level with the water for the greater length of "such bar." (Printed Rec., 121, Findings 16, 17.) There is nothing to indicate that these sand bars were not "perceptible," when they first arose above the surface of the water, a fourth of a mile in length.

The burden of proof rests upon the party who claims to have

acquired title to land by accretion or reliction, to show the several stages of the process, and furnish the court with satisfactory data to enable the court to determine the character of the accretion or reliction, and whether it was imperceptible in a legal sense.

Boorman v. *Sunnuch*, 42 Wis., 434.
Gould on Waters, Sec. 155, note 4, p. 284.

And unless the accretion is either found, or averred and admitted to be "by imperceptible degrees" so that it cannot be perceived in its progress, the claim of accretion will not be sustained. (*Id.*)

Jefferies v. *East Omaha Land Co.*, 139 U. S., 178, 193.
County of St. Clair v. *Livingston*, 23 Wall., 46.

(3.) "However such accretions may be commenced or "continued, the right of one owner of up lands to follow and "appropriate them *ceases when the* formation *passes laterally* "the line in *front of his coterminous neighbor*."

Mulry v. *Norton*, 100 N. Y. 424, *436–7*.

An application of this principle will show that the city of St. Louis could not, by virtue of its ownership of an island higher up the river than plaintiff's land, absorb and acquire by *mere accretion*, the title of the plaintiff, to the river front of his land.

When the formation of the bar, (or accretion if it be so called) passed the lateral lines of the plaintiff's land in Illinois, the right of the city of St. Louis could not follow and appropriate the same as a part of its land higher up the river in Missouri, and thus exclude the riparian proprietor in Illinois from the river front of his land in that state.

In case it was held that the riparian owner of land in Illinois, bounded by the Mississippi river, like that of a littoral proprietor bordering on the sea, did not own the fee beyond high-water mark, still upon the principle of this authority, so much of this newly formed bar or island as formed upon what was the bed of the river after 1865, must be regarded as alluvion or an accretion to that part of the land or bed of the river previously owned by plaintiff's grantor as a part of his dry land.

Upon either hypothesis, the right of the riparian proprietor to the land so formed in front of these surveys, retained the title thereto.

ARGUMENT FOR DEFENDANT IN ERROR.

It is deemed advisable to enlarge in this argument, more fully upon some of the points presented in the brief, inasmuch as the same could not be conveniently embraced within the proper limits of a brief.

First. One of the principal contentions of the learned counsel for the plaintiff in error is that "under a proper appli- "cation of the doctrines of the common law, the title of the "owner of land on the Mississippi river, terminates at the "water's edge, and does not extend to the center of the river." (Plaintiff in Error's Brief, pp. 14, 17.)

1. It is admitted, however, that "the doctrine adopted by the "Supreme court of Illinois, in 1842, in *Middleton* v. *Pritch-* "*ard*, 3 Scam., 519, and followed to the present day, is that "grants of land on the Mississippi river carry the exclusive "right and title of the grantee to the center of the stream, "unless the terms of the grant clearly denote the intention to "stop at the edge or margin of the river." (Plaintiff in Error's Brief, p. 21.) This is, unquestionably, a settled rule of property in Illinois, as fully shown by the authorities cited, *ante*, page 10 under the fourth point of our brief. It is contended, however, that this court established a different rule, in *Railroad Company* v. *Schurmeir*, 7 Wall., 272.

On the other hand, in the case of *Jones* v. *Soulard*, 24 How., 41, this court held that a grant of land on the Mississippi river, "where the expressions designating the water-line are general, "confer the proprietorship on the grantee to the middle thread "of the stream, and entitle him to the accretions." (*Id.*, p. 65.) The court there say:

"Many authorities resting on adjudged cases have been adduced to us in the printed argument presented by the counsel of the defendant in error, to show that from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh water rivers, where the expressions designating the water-line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretions.

"We think this as a general rule too well settled, as part of the American and English law of real property, to be open to discussion; and the inquiry here is whether the rule applies to so great and public a water-course as the Mississippi is, at the city of St. Louis. * * *

"The doctrine that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case, nor does the size of the river alter the rule."

Jones v. *Soulard*, 24 How., 65.

At the date of this decision in the case of *Jones* v. *Soulard*, *supra*, in 1860, and as appears from the cases cited in the brief in that case at pages 48 and 51, the Supreme court of Missouri recognized the rule of the common law in that state, as extending the fee of the riparian proprietor to the middle of the main channel of the Mississippi.

O'Fallon v. *Price*, 4 Mo., 343.
Shelton v. *Maupin*, 16 Mo., 124.
Smith v. *City of St. Louis*, 21 Mo., 36.

This paragraph from *Jones* v. *Soulard*, *supra*, was quoted by this court with manifest approval in the recent case of

Jeffries v. *East Omaha Land Co.*, 134 U. S., 178, *190*.

The supposed conflicting decisions of this court upon that question are merely apparent and not real. The same are all completely reconciled by reference to the established law of this court, viz: *that rules of property, as settled by the local law*

in each state, will be applied and enforced in each state, respectively, by courts of the United States as a part of such local law.

Barney v. *Keokuk*, 94 U. S., 324.

St. Louis v. *Myers*, 113 U. S., 566.

In *Barney* v. *Keokuk*, *supra*, it was held as follows:

"It appears to be the settled law of that state [Iowa] that the title of the riparian proprietors on the banks of the Mississippi extends only to ordinary high-water mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state." * * * "It is generally conceded that the riparian title attached to subsequent accretions to the land affected by the gradual and imperceptible operation of natural causes. But whether it attached to land reclaimed by artificial means from the bed of the river, or to sudden accretions produced by unusual floods, is a question which each state decides for itself." * * * "The confussion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, nothwithstanding the broad differences existing between the extent and topography of the British Islands and that of the American Continent.

"It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas, and under the like influence *it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water*, at variance with sound principles of public policy.

"Whether, *as rules of property, it would now be safe to change these rules where they have been applied, as before remarked, is for the several states themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, *it is not for others to raise objections.* In our view of the subject the correct principles were laid down in *Martin* v. *Waddell*, 16 Pet., 368; *Pollard's Lessee* v. *Hagar*, 3 How,. 212; *Goodtitle* v. *Kibbe*, 9 *id.*, 471. These cases related to tide water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genessee Chief*, 12 *id.*, 443, has declared that the Great Lakes and other navigable waters of the country, above

as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable rivers, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the states by their inherent sovereignty*, and the United States has wisely refrained from extending (if it could extend) its survey and grants beyond the limit of high water. The cases in which this court has seemed to hold a contrary view depended, *as most cases must depend, on the local laws of the states in which the lands are situated.*" (94 U. S., 338.)

Here is a clear declaration of the principle that the question as to whether the title of the riparian proprietor on the Mississippi extends to high-water mark, low-water mark, or to the thread of the stream, is a question of local law, which each state determines for itself; and that the rule established in each state upon that question is a rule of property therein, with which the Supreme court of the United States will not interfere, but will enforce as to property situated in that state.

The same principle was recognized and acted upon in *St. Louis* v. *Myers*, 113 U. S., 566.

It is there declared, that notwithstanding the act of March 6, 1820, admitting the State of Missouri into the Union, expressly declared that the Mississippi river shall "be a common "highway and forever free," still the rights of riparian owners on that river "are left to be settled according to the principles "of state law." (*Id. p. 567.*)

2. The question as to whether a tract of land bordering upon and bounded by a river like the Mississippi extends to high-water mark, low-water mark, or to the middle or thread of the river, is not a mere question of the construction of the patent issued by the United States Government, nor of the acts of Congress under which the public lands were surveyed and sold.

The patent from the United States to land bounded by the Mississippi river, simply makes the patentee a riparian proprietor on that river, with such riparian rights *in the river* as may be accorded to him by the state laws.

As stated in *Barney* v. *Keokuk*, *supra*: "The United "States has wisely abstained from extending (if it could ex- "tend) its survey and grants beyond the limits of high water." (94 U. S., 338.)

The reason for this is obvious.

"By the American Revolution the people of each state, in their sovereign character, acquired the absolute right to all their navigable waters, *and the soil under them.* The shores of navigable waters, and the soil under them, were not granted by the constitution to the United States, but were reserved to the states respectively. And new states have the same rights of sovereignty over this subject as the original ones."

County of St. Clair v. *Lovingston*, 23 Wall., 68.
Pollard's Lessee v. *Hagan*, 3 How., 212.
Goodtitle ex dem. v. *Kibbe*, 9 How., 271.
Doe ex dem. Hallett v. *Beebe*, 13 How., 25.

Congress cannot authorize the sale or grant of the fee of the navigable waters within the new states, because the same belong to such states. (*Id.*)

When the State of Illinois was admitted into the Union it succeeded to all the sovereign rights in, and control over, the navigable or public rivers within the state, as fully and completely as any of the original thirteen states possessed such rights in, or power over the navigable waters therein, and subject only to such powers over the same as were conferred by the constitution on the general government.

For the present purpose, it is immaterial whether the Mississippi is regarded as a navigable river in the strict common law sense, or as a public river, and as such a great common high-

way. It is navigable in fact, and a great public water-way, and as such is subject to the sovereign control of the state within whose borders it is situated. And the question as to whether the fee to the bed of the river is held to remain in the state, subject to the public easement, or is relinquished to the riparian proprietor, subject to the public easement, is not a federal question, but one of local state policy, for each state to determine for itself. It is so treated by the Supreme court of the United States in *Barney* v. *Keokuk, supra*, where it is said: "If they (the states) choose to resign to the riparian proprie-"tor rights which properly belong to them in their sovereign "capacity, it is not for others to raise objections." (94 U. S., 338.)

We have shown that the settled policy and rule of law in Illinois is that the riparian proprietor on the Mississippi owns the fee of the bed of the river to the thread of the stream, or, as it is elsewhere expressed, to the "middle of the main chan-"nel of the Mississippi river."

Buttenuth v. *St. Louis Bridge Co*, 123 Ill., 535. *548.*

This is a matter of local law in that state. Why should the city of St. Louis, or any third party, raise the objection that the state has relinquished this right to the riparian proprietor?

3. The fee of that portion of the bed of the Mississippi river must be either in the State of Illinois or else in the riparian proprietors. This cannot be successfully denied upon the authorities. But it is urged that the plaintiff must recover on the strength of his own title, and not upon the weakness of the defendant's title; and that if, under the law, the title to the land in controversy is found to be in the State of Illinois, the present action must fail. We admit this to be the law. Yet we insist that the question as to whether the State of Illi-

nois, or the plaintiff below, as riparian proprietor, owns the fee to the thread of the river in front of these surveys, must be determined by the law of Illinois, as expounded by the courts of that state.

We have already shown that, under the rules of law as the same are established and constantly adhered to in that state, the riparian proprietor owns the fee to the middle of the main channel of the river.

4. The question as to whether the fee of the riparian proprietor extends to the center thread of the stream, or terminates at high or low-water mark, depends not so much upon the terms of the patent or grant, as upon the local law of the state. As we have shown (*ante*, page 11), it is sufficient if his land extends to and is bounded by the river. The same is analogous to the case of the sale or grant of a tract of land abutting upon a public highway or street of a city. Where, under the local law, the fee of such highway or street is in the abutting owners of land or city lots, a conveyance of such tract of land or city lot, by its numbers, without any mention of the highway or street, will carry the fee to the center of the street or highway on which abuts the lot or tract conveyed.

Banks v. *Ogden*, 2 Wall., 57.

On the other hand, where the fee of such street is, under the local law, in the city, or other municipal corporation, the conveyance of a city lot abutting thereon, by precisely the same description, will not convey the fee to any part of the street.

Zinc Company v. *City of LaSalle*, 117 Ill., 411, 414.

5. It is now urged by counsel for plaintiff in error, that inasmuch as the title of plaintiff's grantor, Blumenthal, to these surveys in the Prairie du Pont Common Fields is based upon

the claims of the inhabitants of the ancient village of Prairie du Pont under the grant from the French Government in 1722, the rules of the civil law govern the case, instead of the common law in force in Illinois. And that inasmuch as under the civil law the sovereign was the owner of the fee of the bed of public rivers like the Mississippi, the same would preclude ownership by the plaintiff as riparian proprietor. The logic of this argument would place the fee in the sovereign State of Illinois when that state was admitted into the Union.

And this would be equally true as to all other parts of the bed of the Mississippi river, as well as all other rivers in Illinois, navigable in fact. So far as relates to this question it is immaterial whether the riparian owner derives his title from the patent of the United States government or from one of these old French claims confirmed by the act of Congress. The fee to the bed of the river would be in the state if the state saw fit to claim it.

But, as held in *Barney* v. *Keokuk*, *supra*, it is competent for states "to resign to riparian proprietors' rights which properly "belong to them in their sovereign capacity; and if a state "does so, it is not for others to raise objections." (94 U. S., 338.)

This is a question of state policy and local law, for each state to determine for itself. (*Id.*) And as we have shown, the State of Illinois has resigned this right to the riparian owners on rivers like the Mississippi.

In the case of *Cobb* v. *Lavalle* 89, Ill., 331, the Supreme court of this state applied this rule to a lot which was a part of the Cahokia Commons and bordered upon the Mississippi river. And it will be observed that these Cahokia Commons were included in the same French grant of 1722 which included these Prairie du Pont Common Fields. (See Printed Record., page 81.)

In that case the Supreme court of Illinois, in respect to a tract of land which was a part of the same old French grant of 1722, says:

"It seems to be the settled law of this country, that the owners of land bordering upon a river not navigable at common law, such as the Mississippi river, will be entitled to claim to the *center of the current of the stream.*" (89 Ill., 334.)

Lavalle v. *Stobel*, 89 Ill., 370.

It was competent for the State of Illinois to adopt its own policy and rules of law upon this question, and it was no more bound to adhere to the civil law upon this than upon any other question, after the state had succeeded to sovereign authority over the public rivers within its borders.

The common law was expressly enacted by the first Territorial Legislature in Illinois; and it has been repeatedly re-enacted in each subsequent revision of the state laws as it is now embodied in chapter 28 of the present Revised Statutes of Illinois.

1 Starr and Curtis' Stat. of Ill., p. 563, § 1.

Indeed, the common law was first enacted and applied to this territory by the original act of the General Convention of Delegates of the colony of Virginia, held at Williamsburg, May 6, 1776. (See Note to 1 Starr & Curtis, Stat. of Ill., p. 563.)

The courts of Illinois have uniformly construed the common law, thus adopted by statute, as conferring upon the riparian owner on the Mississippi, the fee to the bed of the river in front of his land, to the middle of the main channel of the river, or so far as the state boundary extends.

Second. The counsel for plaintiff in error insist, however, that the deed from Augustus A. Blumenthal to Edward Rutz and others, dated December 23, 1873, does not convey to the grantee therein the fee of the bed of the river beyond low-water mark. So far as we can discern in the record, there was no ruling upon this question, or exception in the trial court, sufficient to raise the question here.

However this may be, it is clear that the contention of the learned counsel cannot be maintained.

In the case of *County of St. Clair* v. *Lovingston*, 23 Wall. 64, the court held that:

"It may be considered a canon in American jurisprudence that where the calls in a conveyance of land, are for two corners *at*, *in or on* a stream *or its bank*, and there is an intermediate line extending from one such corner to another, *the stream is the boundary*, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise."

The rule thus laid down in this court is in harmony with and supported by the text writers of acknowledged authority. Thus, in his work upon Real Property, Washburne states the law as follows:

"In respect to streams and rivers not navigable—that is, in which the tide does not ebb and flow—the rule seems to be universal that describing land as running *to* the stream *or the bank*, and by it along the stream *or the bank*, extends to the middle or thread of the stream, the *filum aquæ*, unless there is something in the description clearly excluding the intermediate space between the edge or bank of the stream and its thread."

3 Washb. Real Prop. (4th Ed.), p. 409.

"A grant of land, bounded on a stream not navigable, carries the exclusive right and title of the grantee to the center of

the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin. And that is so, *although the monuments are described as standing on the margin.*"

Angell on Watercourses (7th. Ed.), § 29, and notes.

Luce v. *Carley*, 24 Wend., 451.

Cold Spring Iron Works v. *Tolland*, 9 Cush., 495.

The principle established by the authorities is, that it is immaterial that the call describing the river boundary purports to *start from a point or monument on the bank or margin of the water*, provided the language used in describing that boundary does not otherwise clearly denote an intention to exclude the bed of the river.

Let us apply this principle of law to the present case.

The essential parts of the description contained in the deed, dated Dec. 23, 1873, from Augustus A. Blumenthal to Edward Rutz and others, is as follows:

"Being *the northwestern part* of surveys numbered" [149 to 156 inclusive] "in the Prairie du Pont common fields, "commencing the survey thereof at a mulberry post on the "old surveyed bank of the Mississippi river, on the line be- "tween surveys numbered 156 and 157 in said common fields "as established by Wm. L. Deneen, and from which post a "mulberry" [giving the witness' trees courses and distances around the tract on the southerly side, easterly end and northerly side thereof], "to the line between surveys 148 and 149; "thence along this line, north 33½ degrees west 142 51-100 "chains to the present bank of Mississippi river, thence along "the *extended* line between surveys 148 and 149, north 33½ "degrees west, to low-water mark of the Mississippi river; "*thence down to the extended line between surveys 156 and 157;* "thence south 33½ degrees east (Var. 7 degrees) to the "point of beginning." (Printed Rec., p. 40.)

It is true that the last call on the extended line between surveys 148 and 149, and next before the words descriptive of the river boundary, was a point on the margin of the water, viz: "To low-water mark of the Mississippi river;" but the call descriptive of the river boundary was: "*thence down to the* "*extended* line between surveys 156 and 157." The call does not say "thence *down* (low-water mark) to the extended line," etc., as quoted by counsel for plaintiffs in error on the twenty-third page of their argument.

The word "down" appropriately refers to the river, and has no proper application to a mere point or line. When the scrivener said or wrote the word *down* without saying down what, it is but fair to presume the river was intended as the natural monument the line was to run down. This construction is not only in harmony with, but is clearly demanded by the authorities we have cited. Thus, in the language of this court, before quoted: "Where the calls in a conveyance "of land are for two corners, *at*, in, or *on* a stream, *or its* "*bank*, and there is an intermediate line, extending from one "such corner to another, *the stream is the boundary*, unless "there is something which excludes the operation of the rule "by showing that the intention was otherwise."

County of St. Clair v. *Lovingston*, 23 Wal., 64.

Here, the last call was a point *at* low-water mark of the river; but the next call was an intermediate line "down to the extended line between surveys 156 and 157," without specifying whether it was down the river generally, or down the line of low-water mark; and so we insist that, within the spirit of all the authorities, this description made the river the boundary of these surveys on their north-western ends, notwithstanding the monument, or termination of the last preceding call, was at low-water mark of the river. The river, as we have shown, always had been the boundary of these surveys at that end, and

nothing appears to warrant the conclusion that the parties to this conveyance intended to make any other boundary *than the river* at the north-western end of these surveys.

In construing this deed, all the words of the description must be given effect, if possible. The first clause is: "Being the *north-western part* of surveys" 149 to 156. (Printed Rec., 40.) Now, if Blumenthal retained the ownership of any part of these surveys, north-west of that which he conveyed to plaintiff, it is manifest that he did not convey to him the "north-western part" of these surveys.

It must be conceded that Blumenthal's fee of these surveys extended to the middle of the river; but the contention of the learned counsel for plaintiff in error is, that he did not convey, by this deed, all the land he owned on the north-western end of these surveys, but only to low-water mark.

Such a construction would render nugatory the first clause of the description, whereby he purports to convey "the north-western part" of these surveys.

If the description contained in the deed stopped here, its fair construction would be that Blumenthal conveyed *the north-western part* or ends of these surveys, which, as we have shown, extended to the river. (See 3d Finding, Rec., 118.)

But, to make assurance doubly sure, the following words were added at the end of the description: "The tract hereby "conveyed, containing 500 acres, more or less, *together* with all rights as riparian owner to the accretion or sand bar lying north-westwardly, and *between the extended lines of said* land herein described, *situated in the county of St. Clair, and State* "*of Illinois.*" (Printed Rec., 41.)

It is manifest that the grantor intended to convey all his riparian rights appurtenant to these lands, "between the extended lines" of these surveys *in the county of St. Clair and*

State of Illinois. It cannot be held, consistently with the terms of the deed, that he intended to retain to himself any interest in the fee of the bed of the river.

If the boundary had terminated at low-water mark on the margin of the river, it is plain the same could not have included all the grantor's rights as riparian owner to the accretion or sand bar, lying out in the river opposite these surveys.

The case of *Piper* v. *Connolly*, 108 Ill., 646, is strikingly in point. In that case the description of the river boundary contained in the deed was in these words: "Thence north along "said section line 717 feet *to the south bank* of the Desplaines "river; thence south 47 deg. west *along said south bank*, 1,360 "feet."

It appeared, however, that the contract, in pursuance of which the deed was given, contained these additional words: "together with all water privileges, rights and immunities of "the said party of the first part therewith connected."

The court say: "This, in connection with the fact that "there is no pretense that there are any water privileges, "rights, etc., connected with the tract save those resulting from "the river, being the boundary on one side, *renders it abso-"lutely certain* it was not then intended that the defendant's "rights should terminate at the water's edge," and it was accordingly held that the fee extended to the middle of the river. (108 Ill., 652.)

For stronger reasons, it must be held, in this case, that the fee of the plaintiff extended to the middle of the main channel of the river opposite these surveys.

The trial court found that "Edward Rutz, the plaintiff in "this suit, acquired from said Blumenthal his said title to said "land prior to the commencement of this suit." (Printed Rec., 117.)

If there was any doubt on the face of Blumenthal's deed as to its proper construction, the court had the right to read and construe the same in the light of the surrounding facts, known to the parties at the time of making such deed. It appears upon the face of the deed that the parties thereto at the time of its date, December 23, 1873, knew that "an accretion or "sand bar" then existed out in the river in front of this land, "between the extended lines of said land herein described, "situated in the county of St. Clair and State of Illinois." (*Id.*, 41.)

It also appeared from the evidence on the trial, that at the date of this deed, December 23, 1873, the sand bar, which subsequently developed into the dry land now in dispute, had that year in the spring or June floods, first made its appearance above the surface of the water in front of these lands. (*Id.*, 63, 64, 68.)

The court in its finding of fact on this question, had the right to hold that the sand bar thus expressly conveyed by the deed, was the same sand bar which so existed in 1873, and by accretions thereto subsequently developed into the very land now in controversy.

This fact of itself absolutely precludes the contention that the land conveyed by Blumenthal, was limited by the line of low-water mark on the river.

Every deed shall be most strongly construed against the grantor who signs the same.

If the terms of the deed were doubtful, this principle of law would be conclusive against the contention of plaintiff in error.

Neither Blumenthal, nor his heirs at law, one of whose

sons was a witness on the trial, appear to have claimed any interest in this land, after the making of his father's deed.

Jeffries v. *East Omaha Land Co.*, 134 U. S., 178, *197*.

This court will not force the claim upon them, in violation of the terms and well understood meaning, of their ancestors grant. (*Id.*)

Third. Among other things, the trial court found the following:

"6. That the eastern bank of the river in 1863, was about one-half mile west of the certain dwelling house hereinafter mentioned, then standing on said survey No. 151, and so continued until the year 1865."

"7. That the greater part of the so-called Arsenal island, which now extends over, and is embraced within the boundaries of the lands described in the plaintiff's declaration, is located upon the site of the dry land of said surveys numbered 149 to 156, inclusive, as the same existed from 1850 to 1865; and that the residue thereof (being about one-eighth of the entire width of the same) is located upon the bed of the Mississippi river as it then existed; and easterly of the thread or middle line of said river."

"8. That between the years 1865 and 1873, the river front of the said surveys numbered 149 to 156, was washed away so that in July, 1873, the river front of said lands only extended to the line marked 'River Bank 1873,' on said map; and that said river bank thereafter continued to wash away and cave in, until it reached the line marked 'River Bank, 1884,' on said map."

"9. And the court further finds from the evidence that such washing away of said river bank did not take place slowly and imperceptibly; but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress. That such washing away of said river bank occurred principally at the spring rises or floods of high water in the Mississippi river, which usually occurred in the spring of the year. That such rises or floods varied in their duration, lasting from four to eight weeks, before the waters of the

river would subside to its ordinary stage or level. That during each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river, and was carried away at one time. That in the spring of the year, 1872, Mr. Augustus A. Blumenthal, Jr., the occupant of the land at that time, lived in the dwelling-house situated on said survey No. 151; and the river had previously encroached upon the land so that the house was then about four or five hundred feet back from the river bank and water's edge, as it then existed. When the spring rise or flood occurred that year, the said Blumenthal became alarmed for the safety of his house, and immediately commenced taking said house down and removing the same further from the river bank, and in so doing worked for six or eight days in succession, at the expiration of which time the bank had caved in and washed away so rapidly that the bank and waters of the river had approached within twenty feet of the foundation of the house, and, before the waters subsided, carried away the greater portion of the foundation of the house. And that such caving in and washing away continued until the building of the dike on the eastern side of the river above the said lands, by the United States government in the years 1876 to 1878." (Printed Rec., 119.)

We insist that this sudden and perceptible loss of land which was visible in its progress, did not deprive the riparian proprietor of his fee in the submerged land, nor in any manner change the boundaries of these surveys on their river front, as the same existed in 1865, when the land commenced to wash away.

On the other hand, we find in the argument for the plaintiff in error, at page 23, the following:

"The defendant in error never had title to the bed of the "river. When the dry land covered by his possession was "swept away by the river and ceased to exist, his ownership "of such land also ceased to exist."

The whole current of the authorities upon this question, when applied to the facts of the case, as found by the court, fully support our position as stated above, and necessarily lead to and sustain the judgment of the Circuit court.

The law is thus stated by Washburne: "And if the bed of "the stream changes *imperceptibly* by the gradual washing of "the banks, the line of the land bordering upon it, changes "with it; but if this change *is by reason of a freshet and suddenly* "*done*, the line remains as it originally was."

3 Washb. Real Prop. (4th Ed.), p. 409.
Lynch v. *Allen*, 3 Battle & Dev. (N. Car. Rep.), 62.

Chancellor Kent states the same principle thus: "If a fresh "water river, running between the land of separate owners, "*insensibly* gains on one side or the other, the title of each con- "tinues to go *ad filum medium aquæ;* but if the alteration be "*sensibly* or *suddenly made*, the ownership remains according "to the former bounds." 3 Kent's Com., p. *428.

The uniform current of authority is to the same effect. Angell says:

"Of course, the right of the riparian proprietors to their upland, which is inundated by an encroachment of the sea and then left dry, is still retained; and by their art and industry they may regain the upland so inundated, even when (according to Coke and Foster, 7 Jac. C. B., cited by Lord Hale), the land has been inundated for the space of forty years; and one hundred acres, parcel of a manor, was regained from the river Thames and enjoyed accordingly."

Angell on Tide Waters, pp. 265–6.

"When a stream changes its course by slow and imperceptible steps the riparian proprietors are obliged to accept the consequent alteration in their boundaries, but when the shifting is sudden and well marked, the original *medium filum* continues to be the border line, and the stream so far passes entirely within the land of one proprietor."

Phear on Rights of Water, p. *12.

Speaking of the boundary of land on the sea or tidal rivers, the same author says: "This line is clearly liable from natural causes *to a shifting of position*, from time to time; if the alteration takes place by imperceptible degrees, the rights of the owner or its grantees go with the land, *whether it gain upon the land or not*, upon the principle that *de minimis non curat lex*, and that, therefore, there is no point in the gradual occupation where the law can step in with its interference; but if the new position be taken *suddenly, whether in advance or recession, the old line continues to be the boundary* between the territory of the crown and that of the shore proprietors. It need hardly be added that if an island makes its appearance, it is the property of the person, whether king or subject, to whom the soil on which it rests belonged."

Phear on Rights of Water, pp. *43, *44.

The Supreme court of Illinois recognize this principle thus:

"The law as stated by law writers and in the adjudged cases, seems to be that where a river is declared to be the boundary between states, although it may change, *imperceptibly*, from natural causes, the river as it runs, continues to be the boundary. But if the river *should suddenly change its course*, or desert the original channel, the rule of law is that the boundary remains in the middle of the deserted river bed."

Buttenuth v. *St. Louis Bridge Co.*, 123 Ill., 535, 546.

"Where a river, not navigable, changes its course *or width*, if it gain upon one bank gradually and *imperceptibly*, the owners on both sides stitll continue to own to the center; *if suddenly*, the center of the river remains as before, with reference to the relative title, and in this way one may come to own the whole stream."

2 Hilliard on Real Prop. (4th Ed.), p. 195, § 10.

"When a stream, being a boundary, alters its channel by a gradual process of wear, the boundary shifts with the channel, *but if it changes the same violently and visibly* or by making a cut-off, the boundary adheres to the abandoned channel."

Collins v. *State*, 3 Tex. App. p. 323.

Fourth. If the title of the plaintiff below, to the land in

dispute is not sustained, what has become of his riparian rights on the Mississippi?

It is an indisputable fact that plaintiff's land originally extended to the Mississippi river, and that he was a riparian proprietor on that river. He is no longer such riparian owner, and is cut off from access to the river, if his title to the land, involved in this suit, is not sustained.

The supposed advantage of frontage on the river, in the estimation of the original proprietors of these common fields, is manifested by the conformation of these surveys into long and narrow strips, extending from the Mississippi across the American Bottom to the hills on the Illinois side of the river, a distance of more than three miles.

Whether the title of a riparian owner extends beyond the dry land or not, "he is certainly entitled to the rights of a ri-"parian proprietor whose land is bounded by a navigable "stream; and among those rights are access to the navigable "part of the river from the front of his lot, the right to make "a landing, wharf or pier for his own use, or the use of the "public, subject to such general rules as the legislature may "see proper to impose for the protection of the rights of the "public, whatever those may be." * * *

"This riparian right is property, and is valuable, and, "though it must be enjoyed in due subjection to the rights of "the public, it cannot be arbitrarily or capriciously destroyed "or impaired. It is a right of which, when once vested, the "owner can only be deprived in accordance with established "law, and if necessary that it be taken for the public good, "upon due compensation."

Yates v. *Milwaukee*, 10 Wall., 497, 504.
Dutton v. *Strong*, 1 Black, 25.
Railroad Company v. *Schurmier*, 7 Wall., 272.

Neither the plaintiff, nor his grantor, have done any act, or been guilty of any negligence which occasioned this loss of

land and transfer of title, either to the State of Illinois or the city of St. Louis.

The tenth finding shows that the building by the city of St. Louis of the dikes on the western side of the river, had the effect to throw the current over to the eastern side, and undermine and wash away the plaintiff's land. This loss, or washing away of plaintiff's land was caused by the act of the city of St. Louis, the principal defendant.

When the land again reformed upon the same place where plaintiff's land had been washed away, we insist that the same continued to be the property of the plaintiff; and although the land thus newly formed extended a short distance into the old river bed beyond the former shore line, such additional formation belonged to plaintiff as a deposit on that part of the river bed owned by him in fee, and not to the State of Illinois, or any third party. It must be so held; otherwise plaintiff would be cut off from his river front and riparian rights, without his fault.

And when the United States Government in 1876 and 1878 built the dike and dam on the eastern side of the river, a short distance above the plaintiff's land, the result was that the space, or channel of water between the bar or island as it had formed on the front of plaintiff's land, and the eastern bank of the river, as it existed when the river stopped cutting plaintiff's land away, filled up, so that by 1884 it became, and has since continued to be, dry land on the front of the plaintiff's land out to the western side of the island, or land in question.

It is true, a little more land has been thus restored to the plaintiff than was cut away; but this circumstance ought not to deprive the plaintiff of his riparian rights and access to the river. The State of Illinois does not claim any part of this land, and could not do so consistently with the settled principles of law in that state. It concedes the bed of the river where it formed to the riparian proprietor.

As appears from the seventh finding of facts, seven-eights of the dry lands in dispute "is located upon the site of the dry "lands of said surveys numbered 149 to 156, inclusive, as the "same existed from 1850 to 1865, and that the residue there-"of, about one-eighth of the entire width of the same, is located "upon the bed of the Mississippi river as it then existed, and "easterly of the thread or middle of said river."

The seventeenth and eighteenth findings are as follows:

"17. The court further finds that such bars were not formed by accumulations of sand or soil washed up against the lower end of the island; but by the deposits, in times of flood, of soil and sediment upon the bed of the river below the island.

"18. The court further finds that before the said island was washed away, the main and navigable channel of the Mississippi river was eastwardly of the island, but after the said bar formed lower down the river in front of the plaintiff's land, the main and navigable channel of the river has been, and still is, on the west side of the said bar or island; and that since the said bars or island had so formed in the river in front of said surveys, the boats navigating the river have not run between the bar or island and the bank of the eastern or Illinois shore of the river." (Printed Rec., p. 122.)

It conclusively appears, therefore, that the dry land in question was so formed and arose on that portion of the bed of the river or submerged land, owned in fee by the plaintiff or his grantor as the riparian owner in Illinois, and which was governed by the established rules of law in force in that state.

It is an unquestioned rule of law that the owner of the fee of the bed of a river, or other submerged land, continues to remain the owner of any bar, island or dry land which may subsequently form or arise thereon.

Hargrave's Law Tracts, pp. 15, 17, 31–33, 36, 37.

Angell on Tide Water, pp. 265, 267–8.

Mulry v. *Norton*, 100 N. Y., 424.

It was accordingly held by the Court of Appeals of New York, in the recent case of *Mulry* v. *Norton*, *supra*, that when the front of a tract of land on Long Island, adjoining the ocean, washed away, and remained submerged for a long term of years, and afterwards an island or bar formed in front thereof, within the former boundaries of the main land, but disconnected therefrom by an intervening bay of navigable water, such bar, or newly formed land, belonged (not to the state, but) to the littoral proprietor whose land had been thus washed away, and was again thus left derelict by the sea.

In that case, the Court of Appeals of New York say and quote, with approval, the following:

"A case quite in point is referred to by respondent's counsel as arising in Delaware in 1815, decided by the Court of Common Pleas, upon a learned opinion by Judge WILSON, a copy of which is attached to the plaintiff's brief. The case does not seem to be elsewhere reported. It arose over the ownership of an island called Wilson's bar, which had been created by alluvion upon land formerly contained within the boundaries of an island called Little Tinnicum, but which at some time had been worn away by the ocean. The court say: 'The right to the new island, and also to land gained by alluvion or dereliction, all of which are governed by the same principle, follows the right to the soil which is covered by the water. Though the surface of the lower part of Little Tinnicum was destroyed by the force of the winds and the waves, and it was consequently overflowed by the waters of the river, yet the owner did not lose the propriety of the remaining land covered by water; if it was regained either by natural or artificial means, it continued to belong to the original proprietor. The earth deposited on it became his by right of the alluvion, and, of course, this island, formed on it by such deposit, became his. *And though it probably has extended beyond the limits of the old island, the addition is plainly alluvion.*'

"It would seem, also, to follow, as the necessary consequence of these rules, that the existence of the lagoon between the plaintiff's hotel property and the beach, constitutes no obstruction to his proprietorship of the beach formation,

however created, if located within the original boundaries of his possession."

Mulry v. *Norton*, 100 N. Y., 435.

The findings of the court show that the space covered by water between the front of plaintiff's dry land and the bar or island when it first arose, has since so filled up by deposits from the river, that by 1884, it was all dry land on the river front of plaintiff's land out to the western side of the land in question, except in high water.

Applying these principles to the present case, it is clear that when the bar or island formed in front of Blumenthal's land, within the boundaries over which his land extended prior to 1865, the bar or island which so formed continued to be Blumenthal's land, notwithstanding a portion thereof extended beyond, or farther westward, than the boundaries of his dry land in 1865.

It formed upon that part of the bed of the river owned in fee by the plaintiff and his grantor, and continued to be his after it became dry land.

Fifth. It is apparent that the city of St. Loius has acquired no title to the land described in the declaration, and for which judgment was recovered by the plaintiff below.

The only possible claim of the city of St. Louis to this land is based upon the "act making further provisions for settling claims to land in the Territory of Missouri," of June 13, 1812, and of the subsequent acts relating to the same subject of May 26, 1824, and January 27, 1831.

2 U. S. Stat. at Large, pp. 748–750.
4 U. S. Stat. at Large, p. 66, § 2.
4 U. S. Stat. at Large, p. 435, § 2.

It will be observed that by the terms of these acts the village of St. Louis was only authorized to acquire title to lands

within said village in the Territory or State of Missouri. The village (now city) of St. Louis had no right or power to acquire thereby the title to any lands in the State of Illinois.

The enabling act of April 18, 1818, under which Illinois was organized as a state and admitted into the Union, made the "middle of the Mississippi River" the western boundary of the State of Illinois.

3 U. S. Stat. at Large, p. 429, § 2.

The enabling act of March 6, 1820, under which Missouri was organized as a state and admitted into the Union, made the "middle of the *main channel* of the Mississippi River" the eastern boundary of that state so far as its boundary line was coterminous with the western boundary of Illinois.

3 U. S. Stat. at Large, p. 545, § 2.

These two enabling acts of Congress are held by the Supreme court of Illinois to be construed *in pari materia*, and the common boundary line between the States of Illinois and Missouri is held to be "the middle of the *main channel* of the Mississippi river."

Buttenuth v. *St. Louis Bridge Co.*, 123 Ill., 535.

The "middle of the *main channel* of the Mississippi" has been constantly treated and referred to by the courts and the profession as the eastern boundary of Missouri.

Jones v. *Soulard*, 24 How., pp. 44, 50, 54, 65.
The Schools v. *Risley*, 10 Wall., pp. 100, 115.

This is conceded by counsel for the plaintiff in error, in their argument at page 23, where they say: "Originally the "island was within the city of St. Louis, the eastern boundary "of which extends to the *middle of the main channel* of the "Mississippi river."

It necessarily follows, therefore, that an island in the Miss-

issippi, between those states, must lie wholly in one state or the other, because the *main channel* of the river must run upon one side or the other of such an island in the river. It is not denied that the Arsenal island to which the city of St. Louis acquired title, was on the Missouri side of the river in 1863 and 1864, and wholly within the city of St. Louis. On the other hand it cannot be reasonably claimed that the land described in the declaration was ever in the city of St. Louis, or State of Missouri. In the eighteenth finding of facts, the court found "that *before* the island was washed away, the "*main and navigable channel* of the Mississippi river was eastwardly of the island, but *after* the said bar was formed *lower* "*down* the river in front of plaintiff's land, the main and navigable channel of the river has been and still is on the west side "of the said bar or island, and that since the said bar or island "had so formed in the river in front of said surveys, the boats "navigating the river have not run between the bar or island "and the bank of the eastern or Illinois shore of the river." (Printed Rec., p. 122.)

The St. Louis Public Schools appears to have acquired its title to the island in 1863 and 1864, under Cozzens survey made in 1863. (*Id.*, p. 121.)

The fourteenth and fifteenth findings contain the following:

"14. By deed dated February 8, 1886, the St. Louis Public Schools conveyed its right and title to said Quarantine or Arsenal Island to the City of St. Louis, which lands are described in such deed, *as situated 'In the County of St. Louis and State of Missouri.'*

"15. The court further finds from the evidence that there is not now, and was not at the time of the commencement of this suit, any land whatever above the surface of the water in said river on the site, or within the boundaries of said Quarantine Island as so surveyed in 1853, nor upon the site or within the boundaries of said island as so surveyed in 1863, but that the same was subsequently wholly washed away." (*Id.* p. 121.)

The land described in the declaration, a mile lower down the river, and situated in the State of Illinois, on the eastern side of the river, is obviously not the land to which the city of St. Louis acquired title.

Upon the authorities cited under the sixth point of our brief, if an island or dry land should again arise or form on the site where Arsenal Island existed when it was surveyed in 1863, it would be the property of the city of St. Louis.

Mulry v. *Norton*, 100 N. Y., 424, *435*.

In this event could it hold both tracts of land, a mile distant from each other?

Indeed, the city of St. Louis is still, by virtue of its original title to that island, the owner of the fee of the submerged site of the island before it washed away. (*Id.*)

There are manifold reasons why this claim of the city of St. Louis to the land in dispute cannot be sustained.

(1.) As we have shown (*ante*, *p.* 15), the right of St. Louis to acquire land under the act of June 13, 1812, was limited to land situated within the boundaries of that city, and on the west side of the middle or thread of the Mississippi river.

It is unreasonable to hold that the city of St. Louis can acquire the title to land indirectly and by implication or construction of law, which it was not authorized to take or acquire directly and in pursuance of law.

(2.) The title to land acquired by *accretion* is a title acquired by operation of state law, which each state determines for itself.

Barney v. *Keokuk*, 94 U. S., 337.

The middle of the main channel of the Mississippi river constitutes the boundary line between the States of Missouri and Illinois.

Every island in the Mississippi, between those states, must lie wholly upon one side or the other of the "*main channel*" of that river, and therefore, must be wholly in one state or the other.

The laws of the several states have no extra-territorial effect.

Rorer on Inter-State Law, 336.

Miss. & Mo. R. R. Co. v. *Ward*, 2 Black, 485.

The laws of Missouri cannot confer upon the owner of an island situated in that state the title to land formed by *accretion* or alluvion in the State of Illinois, because the Missouri laws have no operation in Illinois, or upon land situate therein. The laws of Illinois cannot confer upon the owner of an island situate in Missouri the right by *accretion* to land in Illinois, because the laws of Illinois have no operation in the State of Missouri, or upon land situate therein.

It follows, therefore, that the middle of the main channel of the Mississippi river, being the boundary line between these states, constitutes a territorial limit to the right of accretion as respects islands situate upon either side of the middle of such main channel of that river.

This principle of limitation is recognized in the authorities. In *Jones* v. *Soulard*, 24 How., 41, the second paragraph of the *syllabus* is in these words:

"The last call (referring to the boundary of the city of St. Louis on the Mississippi) made the city a riparian proprietor upon the Mississippi, and as such it was entitled to all accretions *as far out as the middle thread of the stream.*"

St. Louis Pub. Schools v. *Risly*, 40 Mo., 356.

371.

Tyler's Law of Boundaries, pp. 85, 86.

The law of Illinois confers upon riparian owners of land in that state, bounded by or fronting on the Mississippi river, the

fee in the bed of the river to the center thereof, or so far as the state boundary extends.

Such riparian owner, by the laws of Illinois, is entitled to all islands in the Mississippi which form east of the center of the river upon the bed of the river, to which he thus holds the fee.

This being the case, by virtue of what law does the owner of an island situate on the west side of the center of the Mississippi, and in the State of Missouri, extend his ownership *by mere accretion* to land situate in the State of Illinois, the fee to which is, by the laws of Illinois, vested in the riparian owner of the land in that state?

(3.) The right of accretion to an island in a river cannot properly be so extended lengthwise the river as to exclude riparian proprietors above or below the island from their access to the river as such riparian proprietors.

Mulry v. *Norton*, 100 N. Y., 424, 436-7.

In the case of *Mulry* v. *Norton*, *supra*, the newly formed bar was claimed as an accretion to Long Beach, with which it connected. But the court disallowed this claim, and, in the decision of that question, laid down principles of law which show the fallacy of the contention of plaintiff in error in this case, that the land in dispute belongs to the city of St. Louis, as an accretion to Arsenal Island. The court there say:

"We are also of the opinion that the principles applicable to the apportionment of lands formed by accretion among the owners of contiguous uplands, is quite controlling as to the rights of the respective parties in this case.

"Such owners are entitled to lands made by accretion or reliction in front of their property and contiguous thereto in certain proportions, according to the formation of their respective shore lines. (Houck on Rivers, Sec. 162; 3 Wash. on Real Prop., 58; Angell on Tide Waters, 171.)

"However such accretions may be commenced or continued,

the right of one owner of uplands to follow and appropriate them *ceases when the formation passes laterally the line of his coterminous neighbor.* A littoral proprietor, like a riparian proprietor, has a right to the water frontage belonging by nature to his land, although the only practical advantage of it may consist in the access thereby afforded him to the water for the purpose of using the right of navigation. This right is his only, and exists by virtue and in respect of his riparian ownership. (Gould on Waters, sec. 149; *Buccleuch* v. *Metropolitan Bd. of Works*, L. R. 5 H. L. 418.

"The principle upon which the rights of littoral proprietors to lands reclaimed from the sea are determined have been frequently discussed in cases arising in our sister states, but those discussions are not important here, and the cases are referred to only for the purpose of showing that such reclamations are apportionable among littoral owners according to the lateral lines of upland possessed by them.

* * * * *

"It would seem to follow from the principles referred to that the owner of Long Beach could not, even if the process of its enlargement and extension was affected by accretion, claim beyond the point where such accretions began to be made, adjacent to the property of adjoining owners, and as the line of each successive owner of uplands was reached in the process of extension, a new obstacle to the appellant's claim would seem to arise."

Mulry v. *Norton*, 100 N. Y., 436 7.

Hopkins Academy v. *Dickinson*, 9 Cush. (Mass.) 544.

Tyler's Law of Boundaries, pp. 75, 87.

The absurdity of the contention on the part of the plaintiff in error, that the city of St. Louis legally acquired title to these bars which from year to year formed upon the bed of the Mississippi below, and extending to the island, is quite apparent from the facts appearing in this case.

It appears from the Map, Exhibit B, that the bars had formed and the so-called Arsenal Island extended as far down the river as shown on that map, which was made from surveys in

1873 and 1884; but at the date of this trial in 1888, these bars had formed and the so-called Arsenal Island had extended *a half mile further down the river than indicated on that map.* (Printed Rec., p. 54.)

If the defendant in error has thereby lost this land and access to the river in front of his surveys, then all these riparian proprietors down the river so far as these bars have formed or may hereafter so form in front of their land, must lose their title and surrender the same to the city of St. Louis, as a part of its Arsenal Island.

This will not do. Such extensive and rapid changes in these alluvial formations, will not transfer title from one proprietor to another.

Gould on Waters, Secs. 158, 159.
Mussumat, etc., v. *Ghose*, 4 Moore's India App., p. 405.

The counsel for plaintiff in error have entitled this cause on the cover of their argument: "The Arsenal Island Case."

Permit me to add, that Arsenal island is not altogether a stranger in this court. It made its first appearance here, as I understand, in *Carrick* v. *Lamar*, 116 U. S., 423, and is there described as having been a "moving mass of alluvial deposits," so that "even during the time of a survey what would be a "monument and a boundary to-day might require a change to-"morrow, and that, therefore, as long as the same causes con-"tinued to operate and make the island *a mere moving mass of* "*alluvial deposits*, it was useless to establish corners which "would be subject to immediate obliteration." (*Id.*, 425.)

To such formations, traveling for miles from one state to another, the law of title by accretion clearly has no application. Its progress cannot be imperceptible in a legal sense.

If the fee to this bar, which formed a quarter of a mile in length, in front of these surveys, in a single flood, and which subsequently developed into this part of the so-called Arsenal Island, passed from Rutz to the city of St. Louis, when did the transfer take place? Was it when the sediment first commenced to settle and form a deposit on this portion of the bed of the river? Was it when it had accumulated to the depth of, say, three feet of mud and sand, and thereby formed a bar which was still submerged by the waters of the river, but at so great a depth as not to be discernible without taking soundings? Was it when it arose so near the surface, that the experienced eye of the river pilot could discern the existence of the bar, though still several feet beneath the surface of the water? Or, was it when the surface of the bar first appeared above the surface of the water and became dry land at ordinary stages of the river?

In either case, in order to maintain the contention of the plaintiff in error, there was an instantaneous transfer of a quarter of a mile of land from Edward Rutz to the city of St. Louis, at the same moment of time. Such a transfer is not title by accretion, within the meaning of the law.

JAMES K. EDSALL,
Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1890.

No. 1096.

CITY OF ST. LOUIS,
Plaintiff in Error,

— *vs.* —

EDWARD RUTZ,
Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT, BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

ALONZO S. WILDERMAN,
of Counsel.

BELLEVILLE ADVOCATE PRINTING HOUSE

CITY OF ST. LOUIS, Plaintiff In Error,

vs.

EDWARD RUTZ, Defendant in Error.

ERROR TO CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

STATEMENT.

This is an action of ejectment brought by the plaintiff to recover certain lands situated in the County of St. Clair and State of Illinois, and described as follows: Commencing the survey thereof at a point on the line between surveys 148 and 149 in the Commonfields of Prairie du Pont, from which the southernmost corner of said survey 148 at the bluffs bears south 33½ degrees, east (var. 6 degrees) 249.25 chains, thence north 33½ degrees west, with said line of said surveys extended, to the center thread of the Mississippi river, thence along the center thread of said river to the line between surveys 156 and surveys 157 extended to said center thread of said river, making the right angle distance between the said extended lines 34.60 chains, thence south 33½ degrees east along said last mentioned extended line to a point in the line between said surveys 156 and 157 of said Commonfields from which the most southern corner of said survey 156 bears south 33½ degrees east, 254 chains distant, thence along the meanders of the original bank of the Mississippi river as surveyed by the United States government in surveying said Commonfields, to the point of beginning, with the appurtenances. This description, which is that contained in the first count of the declaration, it will be observed, calls for a straight extention or prolongation of the side lines

on the shore to the center of the river, while the description, as contained in the second and third counts, calls for the prolongation of the side lines so that they will be dropped at right angles from the thread of the stream to the ends of the side lines on the shore.

It appears that surveys 149, 150, 151, 152, 153, 154, 155 and 156 of the Commonfields of Prairie du Pont, in St. Clair County, Illinois, were confirmed by the United States to the various persons named in the report of Michael Jones and E. Backus, Commissioners, dated December 31, 1809.—see American State Papers, Vol. 2 Public Lands (Duff Green's Edition) pp. 167, 170, 175— by the Act of Congress of February 20, 1812 (2 U. S. Stats. at Large, page 678, section 3), and so the title is out of the United States.

A reference to facts, which are part of the general history of the country, will show the title to the lands here in dispute never was in the United States, but they were allotted and granted by the French Government to various persons and these grants and claims were protected by an article in the treaty of peace between France and Great Britain of 1763, and again by the treaty of 1783 between Great Britain and the colonies, and again in the deed of cession from Virginia to the United States and in the Ordinance of 1787, and the action of the Commissioners and of Congress was simply to ascertain the facts and confirm what had been done nearly a hundred years before that time. (See *Hebert vs. Lavalle*, 27 Ill., 448.)

It also appears from that report, and its accompanying plats, and the field notes of the origi-

nal government survey the above enumerated surveys bounded on the Mississippi river,—all of the surveys "extending from the hills to the Mississippi," according to the report—and so they extended to the middle of that river—the thread of the stream.

The deed from Dushaneau and Lacroix and wives to Blumenthal, of December 20, 1849, conveys surveys 149, 150, 151, 152 and 153, "as described on the plat of the Commonfields of Prairie du Pont," and the deed of January 23, 1850, from N. Penseneau and wife, Harriet S. and Louis P. Penseneau to Blumenthal, expressly bounds the surveys conveyed —154, 155 and 156—by the Mississippi river, so that Blumenthal unquestionably took the title to the thread of the stream.

It also appears from the evidence that in 1872 or 1873 a sand bar or accretion had formed in the Mississippi river in front of the shore lands of the elder Blumenthal in the above mentioned surveys by the deposits of alluvion on the lands of Blumenthal which were then under water, and which has gradually developed into the lands sued for in this action; at any rate the evidence fails to show the sand bar there formed has gone, or any other formation or accretion in the river in front of the lands Blumenthal owned on December 23, 1873, and all navigation on the east side of this bar or island had permanently ceased in 1874.

It also appears that in 1850, when Deneen, fo Blumenthal, surveyed the lands which the latter had then just acquired, there had an accretion formed on the front of these surveys as they existed when they were surveyed by the government, and as they

existed when the river bank on their front was surveyed in 1814, extending northwestward from the shore line of 1814 a distance of about 16.50 chains—see plat plaintiff's exhibit B—and of all these lands Blumenthal took possession, by his tenants, in 1850 and paid all the taxes legally assessed thereon for the years 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871 and 1872: that he and all the adjacent owners, fenced or occupied these accretions by a straight prolongation of the side lines on the shore towards the middle of the river, and that Deneen surveyed those accretions by a straight prolongation of the side lines on the shore.

It also appears from the evidence and the plats of both Hilgard and Cozens (which it seems all concede to be substantially correct) that every part of the land sued for lies east of the middle of the Mississippi river as it was in 1814, as it was in 1818 when Illinois was admitted into the Union and its boundaries fixed, as it was in 1881, and as it now is.

It also appears from the evidence the Mississippi river has not changed its channel so far as these lands at this point are concerned; that there is not now and has not been since 1874, and perhaps earlier, any navigable water on the east side of the so-called island.

It also appears that soon after the year 1863, the river commenced to wash away its eastern or Illinois bank or shore, and that in from 1865 until 1873 the bank caved in very rapidly as much as the amount of a block of ground in the city would be washed away in a day or two, and in 1872 in a period

of about eight days it washed away four or five hundred feet of ground from these surveys, including the site and foundation of the house in which Blumenthal, jr., then resided, but it also appears the river had not, opposite these surveys, receded from or left the rocky shore on the Missouri side of the river.

It also appears the river is now confined within a channel the east bank of which is the west shore line of the land in controversy here, in other words the western shore line of the so-called island is the present east bank of the Mississippi river and has been so since about the year 1876.

It appears that on December 23, 1873 Blumenthal, whilst these lands were thus situated, conveyed them to E. Rutz, G. F. Hilgard, W. Bushnell, C. E. Lippencott and M. Henderson by a description which was clearly intended to embrace them—"Being the northwestern part of surveys 149, 150, 151, 152, 153, 154 155 and 156, in the Prairie du Pont Commonfields," followed by a description by courses and distances "to low water mark of the Mississippi river; thence down (the river) to the extended line between surveys 156 and 157, thence south 33½ degrees east to point of beginning," and then adding to this a description of further lands as follows: "The tract hereby conveyed containing 500 acres more or less, together with all rights as riparian owner to the accretion or sand bar lying northwestwardly and between the extended lines of said land herein described, situated in the County of St. Clair and State of Illinois."

The lands embraced in the title papers given in evidence on the part of the defendant are described

as being in sections 2 and 3 of township 44 north, range 7 east of 5th principal meridian, and the Court must know no such land is situated in St. Clair County, Illinois, and is situated a distance of from one to three miles further up the river than the lands in controversy.

It appears the lands in dispute are of the value of at least $16,000.00.

BRIEF.

On behalf of the plaintiff we present the following points and authorities, which we contend should control the decision of this cause in his favor.

The surveys embracing the lands described in the plaintiff's declaration having bounded on the Mississippi river, or having been bounded by it, the title to the soil to the middle of that river, or to the thread of the stream was in those persons under whom the plaintiff claims title.

Middleton vs. Pritchard, 3 Scam 510:
Canal Trustees vs. Haven, 11 Ill., 554:
City of Chicago vs. Laflin, 49 Ill., 172:
Ensminger vs. The People, 47 Ill., 384:
Lovingston vs. St. Clair County, 64 Ill., 56:
Braxon vs. Bressler, 64 Ill., 488:
C. & Pac. R. R. Co., vs. Stein, 75 Ill., 41:
Houck vs. Yates, 82 Ill., 179:
Cobb vs. Lavalle, 89 Ill., 331:
Washington Ice Co vs. Shortall, 101 Ill., 46:

Trustees of Schools vs. Schroll, 120 Ill., 509;
Jones vs. Soulard, 24 How U. S. 44;
County of St. Clair vs. Lovingston, 23 Wall., 56;
Warren vs. Thomaston, 75 Me., 329 (46 Am. R. 397.)
Arnold vs. Munday, 1 Halst. 1 (10 Am. Dec. 356, and note.)
Municipality No. 2, vs. Cotton Press, 18 La., 122 (36 Am. Dec. 624;)
Walker vs. Shepardson, 4 Wis. 513 (65 Am. Dec. 324, and note.)
Ryan vs. Brown, 18 Mich. 196 (100 Am. Dec. 154, and note.)
Berry vs. Snyder, 3 Bush. Ky., 266 (96 Am. Dec. 219.)
Norcross vs. Griffiths, 65 Wis., 599.

When the alluvion forming the so-called Arsenal Island was deposited within the boundaries and upon the soil of Blumenthal, although that soil was under the waters of the Mississippi river, it became a part of his soil and was his land.

County vs. Lovingston, 23 Wall. 46;
Lovingston vs. St. Clair County, 94 Ill. 56;
Braxon vs. Bressler, 64 Ill. 488;
Washington Ice Co. vs. Shortall, 101 Ill. 46;
Village of Brooklyn vs. Smith, 104 Ill. 429;
Houck vs. Yates, 82 Ill. 179;
New Orleans vs. United States, 10 Peters 662.

When the river by erosion destroyed and eat away the so-called Arsenal Island as surveyed in 1853 and 1863 and described in defendant's deeds, and transported it beyond the boundaries thereof, its title to it was gone, at least until it reappears above water on its original site.

Mulry vs. Norton, 100 N. Y. 426 (53 Am. R. 206, and note;)

Morris vs. Brooke, 53 Am. R. 215.

When the Mississippi river encroached upon the lands of Blumenthal by freshets, as detailed in the evidence, so that tracts fifteen or twenty feet in width at one time, and forty or fifty feet in width in a day's time, and one time from four hundred to five hundred feet in width in eight days, were carried away and submerged by the river, and until it had, in this manner, carried away a tract of half a mile in width across the surveys, this was not a gradual and imperceptible change of the channel of the river within the meaning of the law, and the *filum* of the stream was not changed in front of these lands.

County of St. Clair vs. Lovingston, 23 Wall. 46;

Buttenuth vs. St. Louis Bridge Co., 123 Ill. 535;

Lynch vs. Allen, 4 Dev. and Bat. 62 (32 Am. Dec. 671;)

Boorman vs. Sunnuchs, 42 Wis. 233;

Mulry vs. Norton, 100 N. Y. 426 (53 Am. R. 206;)

Mulry vs. Norton, 29 Hun. 664;

Foster vs. Wright, 4 C. P. Div. 438 (30 Eng. R. by Moak 640;)

Fattel's Law of Nations, pp. 121, 122, §§ 268, 269;

Gould on Waters, §§ 155, 159, and notes;
Angell on Water-courses, §§ 53, 57, and notes;
Tyler on Boundaries, pp. 84, 85, 86, 87;
Angell on Tide Waters, p. 265.

An island in a river deemed in law unnavigable, but subject to the public easement of navigation, belongs to those whose lands are bounded upon the river, they being, as we have seen, the owners of the soil under the waters of the river to the middle of the stream, own the island which arises upon their soil, and if it lies wholly on one side of the thread of the stream, it will belong to the owner on that side; if it lies in the middle of the stream, the dividing line will be drawn according to the original thread of the stream, as if the island were under water.

Houck vs. Yates, 82 Ill. 179.
Ingraham vs. Wilkinson, 4 Pick. 268 (16 Am. Dec. 342;)
Deerfield vs. Ames, 17 Pick. 41 (28 Am. Dec. 276;)
Trustees of Hopkins Academy vs. Dickinson, 9 Cush. 544;
McCulloch vs. Wall, 4 Rich. S. C. 68 (53 Am. Dec. 715;)
Stanford vs. Mangin, 30 Geo. 355;
Tyler on Boundaries, pp. 75, 76, 77.

Where, as in Illinois, riparian owners of lands bounded upon unnavigable rivers take title to the soil under the water, to the middle or thread of the stream, and there is an island situated in the river, which has been sold and conveyed so as to separate it from the shores of the river, the owner of the island

will not be entitled to alluvion deposited by the river at the lower end, or foot, of the island, because the formation of the alluvion will have passed the lateral lines of his coterminous neighbors, and to allow the owner of the island to hold it would be to allow him to invade their rights, which extend to the middle of the river below the foot of the island.

Mulry vs. Norton, 100 N. Y. 426 (53 Am. R. 206;)
Clark vs. Campard, 19 Mich. 325;
Richardson vs Prentiss, 48 Mich. 88;
3 Washb. Real Property, 58;
Angell on Watercourses, §§ 23, 54*a*, 55 56 and notes;
Gould on Waters, § 162 and notes.

Although the river swept away a large part of Blumenthal's land on the river front,—a strip of about half a mile in width of the shore line of 1850, existing when he acquired title—yet the main body of the surveys, with their lines and corners, still being in existence, and remaining intact, the identity of the lands swept off by the river is not lost, and upon the recession of the river they were still Blumenthal's, or his grantees'.

Mulry vs. Norton, 100 N. Y. 426;
Morris vs. Brooke, 53 Am. R. 215;
Gould on Waters, § 158 and notes;
Sedgwick & Wait on Trial of Title, §§ 123, 124;
Hargrave's Law Tracts, pp. 15, 16.

Whether the deposit of alluvion upon Blumenthal's, or the plaintiff's, soil, by the river, was the result of natural or artificial causes, makes no differ-

ence; the result as to ownership is the same in either case, if the artificial cause was not in itself unlawful.

County of St. Clair vs. Lovingston, 23 Wall. 46;
Lovingston, vs. St. Clair County, 64 Ill. 56;
Baxon vs. Bressler, 64 Ill. 488;
Godfrey vs. City of Alton, 12 Ill. 37;
Halsey vs. McCormick, 18 N. Y. 147;
Patterson vs. Gelston, 23 Md. 432;
Lockwood vs. N. Y. & H. R. R. Co., 37 Conn. 387;
Tyler on Boundaries, pp. 84, 85, 86, 87;
Gould on Waters, p. 286 and note 6.

The dyke constructed by the United States from the eastern bank of the Mississippi river to the so-called island is a lawful structure; within the lawful powers of the United States, executed to improve the navigation of the Mississippi river which is the boundary and a means of commerce between the states, and its construction was an exercise of sovereign power.

Smith vs City of Rochester, 92 N. Y., 463;
Pollard's Lessee vs. Hagan, 3 How. U. S., 222;
Gilman vs. Philadelphia, 3 Wall. 713;
The Daniel Ball, 10 Wall 557.

The riparian right to future alluvion, is a vested right, and a rule of property, upon the faith of which property rights have been acquired

County of St. Clair vs. Lovingston, 23 Wall, 46;
Ensminger vs. The People, 47 Ill., 389;

Braxon vs. Bressler, 64 Ill., 488;
Lovingston vs. St. Clair County, 64 Ill., 56;
Barney vs. Keokuk, 94 U. S. R., 338;
Municipality No. 2 vs. Cotton Press, 18 La. Ann., 122 (36 Am. Dec. 624.)
Norcross vs. Griffiths, 65 Wis., 599;
Olson vs. Merrill, 42 Wis., 203.

The right to future alluvion being a vested right, and a rule of property, on the faith of which rights of property have accrued, it can not be divested by legislation, and with equal reason it can not be divested by a change of decision by the Courts.

Ensminger vs. The People, 47 Ill., 389;
Braxon vs. Bressler, 64 Ill., 488;
Gelpcke vs. Dubuque, 1 Wall., 175;
Butz vs. City of Muscatine, 8 Wall. 575.

The Court will take judicial notice that the lands described in the title papers given in evidence by the defendants do not lie in St. Clair County, and never did lie in the State of Illinois.

Dickenson vs. Hendryx, 88 Ill., 66;
Crawford vs. The People, 82 Ill., 554;
Kile vs. Town of Yellowhead, 80 Ill., 208;
Gooding vs. Morgan, 70 Ill., 275;
Dickenson vs. Breeden, 30 Ill., 322.

The lands sued for being in Illinois, the laws of this State on the subject of the ownership to lands bounded on the Mississippi river must determine the question of title to them, including the right to alluvion.

County of St. Clair vs. Lovingston, 23 Wall., 46;
Barney vs. Keokuk, 94 U. S. R., 338;
Pollard's Lessee vs. Hagan, 3 How. U. S. R., 212;
Smith vs. Maryland, 18 How. U. S. R., 71;
New Orleans vs. U. S., 10 Peter's R., 662

Blumenthal, by the deeds to him acquired color of title to the surveys, and when he went into possession of them by his tenants, leased them out, exercised acts of ownership over them, claimed to own them, and paid all the taxes legally assessed upon them for twenty years, or even for seven years, and while he was in possession, he was the absolute owner of these lands, and this is sufficient title in his grantees to support this action.

Riverside Co. vs. Townshend, 120 Ill., 9;
Harland vs. Eastman, 119 Ill., 22;
McDuffie vs. Sinnott, 119 Ill., 449;
Keith vs. Keith, 104 Ill., 397.
Pauline vs. Hale, 40 Ill. 274;
Dewitte vs. Bradbury, 94 Ill. 446;
Sedgwick & Wait on Trial of Title to Land, § 717.

Blumenthal's title to the accretions by virtue of his possession under claim and color of title, and the payment of all taxes legally assessed, followed the title to the uplands and accrued at the same time, no matter whether the accretions had existed for but a year or a day.

Campbell vs. Laclede Gas Co., 84 Mo. 352.

When Blumenthal entered into possession of the lands described in his deeds, his possession was co-extensive with the boundaries of the lands described in those deeds, there being no adverse possession.

Ellicott vs Pearl, 10 Peters, 442.

It is a general rule of law deeds are to be construed most strongly against the grantor, and this principle applies as well to matters of description and boundary as to any other part of the deed.

Middleton vs. Pritchard 3 Scam. 510;
Cottingham vs. Parr, 93 Ill. 233.

In view of the language of the deed of December 23, 1873, and all the attendant circumstances it is clear Blumenthal intended, by that deed, to convey, and did convey, the premises in dispute to Rutz and others—those lands being situated to the southeast side of the thread of the Mississippi river—for it is a rule of law that grants bounded upon rivers or their margins, above tide water, carry the exclusive right and title of the grantee to the centre thread of the stream, unless the terms of the grant expressly declare the intention to stop at the margin, or so clearly evince it as to leave no doubt.

Helmer vs. Castle, 109 Ill. 664;
Piper vs. Connolly, 108 Ill. 646;
Canal Trustees vs. Haven, 11 Ill. 554;
Braxon vs. Bressler, 64 Ill. 488;
Watson vs. Peters, 26 Mich. 508;
Richardson vs. Prentiss, 48 Mich. 88;
Ryan vs. Brown, 18 Mich. 196 (100 Am. Dec. 154;)
Luce vs. Carley, 24 Wend. 451 (35 Am. Dec. 637;)

Dillingham vs. Roberts, 75 Me. 469 (46 Am. R. 419;)
Salter vs. Jonas, 10 vroom, 469 (23 Am. R. 229;)
Ex-Parte Jennings, 6 Cowen, 518 (16 Am. Dec. 447;)
Oxten vs. Groves, 68 Me, 371 (28 Am. R. 75;)
Low vs. Tibbetts, 72 Me. 92 (39 Am. R. 303;)
Kneeland vs. Van Valkenburgh, 46 Wis. 434 (32 Am. R. 719;)
Norcross vs. Griffiths, 65 Wisc. 599;
Sleeper vs. Laconia, 60 N. H. 201 (49 Am. R. 311;
3 Kent's Com. *427;
Angell on Watercourses §§ 9, 17, 23;
Gould on Waters, § 195.

The side lines of land which is bounded by a river are to be continued to the stream in a straight line, if not otherwise defined in the deed; besides, the descriptions in the deeds here, and the facts, call for a straight extension.

Gould on Waters, § 194, p. 342.

ARGUMENT.

With reference to the questions arising on the questions submitted by the defendants to the trial court to be held as matters of law, I shall take the liberty of referring the court to the brief of Mr. Edsall, as he has fully discussed them.

It seems to be conceded on the other side that Blumenthal's title to the lands described by his deeds

of December 20, 1849, and January 23, 1850, extended to the middle, or thread, of the Mississippi river. But if it were not so conceded, there can be no doubt about it, for if there is anything which has been settled by the Courts of the State of Illinois, it is that where lands are conveyed bounding a stream which is deemed unnavigable at the common law, the grant of the soil extends to the middle or thread of the stream; and that it is within the power of the Supreme Court of Illinois to settle this question we presume will hardly be questioned since the decisions of this Court, in Pollard's case, 3 How., 212, the New Orleans case, 10 Peters, 662, and the Barney and Keokuk case, 94 U. S., 338.

The Supreme Court of Missouri, after having declared and followed the rule as laid down by our Supreme Court, (*O'Fallon vs. Price*, 4 Mo., 343; *Shelton vs. Mappin* 16 Mo., 124; *Smith vs. City of St. Louis*, 21 Mo., 361; *Public Schools vs. Risley*, 40 Mo., 356), upon a mistaken view of the case of *Railroad Company vs. Shermeier*, 7 Wall, 272, and the Barney case, has in *Benson vs. Morrow*, 61 Mo., 353, developed a doctrine which is not recognized in any other Court of this country—that the beds of our streams above tide water, which are navigable in fact, belong to the United States, and which is repudiated by the Supreme Court of the United States. (See authorities cited to paragraph 13 of our brief.) Indeed the doctrine of the Benson case is very much shaken, if it is not overthrown by the same Court in the case of *Campbell vs. Laclede Gas Co.*, 84 Mo., 352, which reiterates the doctrine of the early Missouri cases on the subject of riparian ownership, although the Benson case was cited.

The title of Blumenthal then extending to the middle or thread of the river when he acquired his title at the beginning of the year 1850, it becomes necessary to determine where that middle or thread was. It will appear by the map, plaintiff's exhibit "B," that in 1814, when the old government survey was made, the middle of the river was far to the northwest of the lands in dispute; in other words, the soil then under the water, but which is now occupied by the so-called island, was embraced within the confirmations by the United States of these surveys to the confirmees, and to which they took, or rather kept, title. It will also appear that the shore on the northwestern, or Missouri side of the river, opposite these lands was always bold and rocky and has never changed, but that by gradual accretion to the Illinois shore the river had, between 1814 and 1850, at the time of Deneen's survey, receded, and the dry land extended to the northwestward about sixty rods from the old surveyed bank of 1814, and that part of this dry land then occupied the space now occupied by this so-called island. It also appears that about 1855 or 1866 the current of the water in the river had so changed as to cause it to strike the Illinois shore in this land, and in the spring freshets it would cut away the land on the bank very rapidly; according to the evidence tracts as large as a city block going into the river in a day; pieces from ten to fifteen feet in width would fall into the river at once, and in 1872, during the spring freshet in the river, a strip of from four hundred to five hundred feet in width, including the site and foundation of the dwelling house where Mr. Blumenthal, Jr., who was then a tenant of his father,

then resided, was carried away by the river in a space of eight days, although it was between four and five hundred feet back from the bank. It appears the action of the waters upon the shore was irregular, owing, perhaps, chiefly to the fact that freshets did not occur every spring, but their destruction of the shore was always rapid when they did occur, and the final result was that before it ceased it had cut away a tract of Blumenthal's land extending back towards the southeast about half a mile from the shore line of 1850, as surveyed by Deneen.

Thus it appears that whether the middle of the river is a fixed line, or a shifting line, it was and always has been far to the northwest of the lands in dispute, because, if the old line of 1814 is to be taken as the line, it was, as we have seen, to the northwest of every part of this land: of this there is, and can be no dispute. Again, if this line is a shifting one, when the gradual accessions to the shore prior to 1850 extended some sixty rods to the northwest of the shore line of 1814, this gradual extension pushed the middle or thread of the stream gradually to the northwest of the middle of 1814, so that the site of this land was still further on the lands of Blumenthal, then under water; indeed, part of this land is, as we have seen, now occupying the site of a part of Blumenthal's land which, in 1850 and for nearly twenty years afterwards, were dry lands and actually occupied by his tenants.

But suppose we concede for the purposes of this argument that this middle or thread of a stream is a shifting line, still the change, in order to change or shift the boundary lines either of the territorial limits of nations, or between the lands of individuals, must

be gradual, slow and imperceptible. In Gould on Waters, § 155, page 284, it is said: "Land formed by *alluvion*, or the gradual and imperceptible accretion from the water, and land gained by *reliction*, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made. There is no distinction in this respect between soil gained by accretions and that uncovered by reliction. The change is imperceptible *when it is not discernable in its progress*, though the fact that there has been an increase may be perceptible year by year or at shorter intervals. The external bounds of estates situated upon the shore of the sea or of navigable rivers may thus gradually shift as the water recedes or encroaches." In § 159, at page 291, the same author says: "If an unnavigable stream, in which the title of riparian owners extends *ad filum aquae*, slowly and imperceptibly changes its course, the boundary line is at the center of the new channel." In Vattel on the Law of Nations, page 121, § 269, it is said: "As soon as it is determined that a river constitutes the boundary line between two territories, whether it remains common to the inhabitants on each side of its banks, or whether each shares half of it, or, finally, whether it belongs entirely to one of them, their rights with respect to the river are in no wise changed by the alluvion. If, therefore, it happens, that, by a natural effect of the current, one of the two territories receives an increase, while the river gradually encroaches on the opposite bank, the river still remains the natural boundary of the two territories, and notwithstanding the progressive changes in its course, each retains over it the same rights which it

possessed before: so that, if, for instance it be divided in the middle between the owners of the opposite banks, that middle, though it changes its place, will continue to be the line of separation between the two neighbors."

In *Foster vs. Wright*, 4 Com. Pl. Div. R. 438 (30 Eng. R. by Moak 640) the Court, by Lindley J., said: "The change of the river has been gradual; and, although the river bed is not now where it was, the shifting of the bed has not been perceptible from hour to hour, from day to day, from week to week, nor, in fact, at all, except by comparing its position of late years with its position of many years before. Under these circumstances, I am of opinion that for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner." This, too, seems to be the doctrine of the case of *Butcenuth vs. St. Louis Bridge Co.*, 123 Ill., 535, although there are some expresssions which might indicate a contrary doctrine.

But, while the *filum* may change, is it always understood this change must be gradual and imperceptible; indeed this change is always dependent upon the changes at the shores, the accession of alluvion or the recession of the waters, which must always be gradual and imperceptible, and it is therefore proper to consider them together, as governed by the same principle.

As we have already seen, the change of the river channel claimed to have taken place since 1863 was caused by the sudden and violent spring freshets in the river, and took place so as to be readily seen from hour to hour while it was going on, when whole tracts were carried into the river in a day and at

once. These rises or freshets came usually in May or June, but sometimes earlier, and would continue for from four to six weeks at a time, and during such a freshet a strip of land from 50 to 100 feet in width, depending, of course, on the violence of the flood, would disappear, and during one of these freshets in 1872 a strip of from 25 to 30 rods, 400 to 500 feet in width, was swallowed up in the course of eight days. This is not a case of gradual and imperceptible change such as is mentioned in the authorities.

In Gould on Waters, § 155, p. 284, it is said: "The change is imperceptible *when it is not discernible in its progress*, though the fact that there has been an increase may be perceptible year by year or at shorter intervals."

Lynch vs. Allen, 4 Devereau & Battel, 62 (32 Am. Dec. 671) the Court said: "We do not indeed hold that as the deed to the lessor of the plaintiff called for a marked line, that this line, wherever established, was the boundary of that deed. We agree with counsel for the defendant that as the deed contains a double description 'along the river,' and a 'marked line,' the natural object was the more important description, controlled the marked line, and was in law the true boundary. But it does not follow that because the river has deserted the bed in which it flowed when that deed was executed, that the boundary of the land of the lessor of the plaintiff has shifted with it. Admit that such would have been the consequence if the river had receded from its southern bank by small and almost imperceptible gradations, a point upon which no opinion is intended to be expressed or intimated, this consequence does

not follow from changes by sudden and violent floods. Such is stated to have been the fact in this case. The change of the bed of the river was made by freshets, which we must understand to be excessive floods producing violent and visible changes."

In *County of St. Clair vs. Lovingston*, 23 Wall., 46, the Court, at page 68, said: "In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

In *Boorman vs. Sunnuchs*, 42 Wisc., 233, where the plaintiff claimed that the water from a portion of the bed of a pond had slowly and imperceptibly receded, and by reason of such reliction he, by reason of the contiguity of his lands on the shore, was the owner of it. The action was commenced in the spring of 1874, and during the summer of 1874 the balance of the bed of the pond was laid bare by the water drying up. The Court said: "It is very manifest that the water might have receded altogether too suddenly to have vested the title in the uncovered land in the plaintiff, and yet a person watching the pond be quite unable to see the water recede. We take it that had the whole fall in the water occurred within a week, perhaps within a day, at a uniform rate, the human eye is not sufficiently acute to have detected the process. Yet if a portion of the bed was laid bare by a process so sudden, no

one will contend that the portion thus uncovered became thereby the property of the owner of the land adjoining." * * * As to that portion of the bed of the pond which was covered with water when the action was commenced, we are inclined to think from the evidence, that the water disappeared too suddenly and sensibly to vest the title to such portion in the plaintiff."

In *Mulry vs. Norton*, 100 N. Y. 424 (53 Am. R. 206), the Court said: "The beach to the west of the (East Rockaway) inlet, during the period from 1835 to 1869 underwent a succession of changes which it is unimportant to follow in detail, but usually consisted of a line or group of bars, shoals, islands and channels, extending from the inlet to the shore of the main land beyond the premises in dispute, but which were constantly undergoing physical changes by the influence of the laws to which they were naturally subject. These bars, shoals and islands were from the operation of the tides and winds filling the channels, separating them, occasionally joined together, and at one time by the removal of the inlet in question to the westward, formed a continuous bar from Long Beach to a point west of the premises in dispute, and remained in that position for about three years. The removal of the inlet to the west was not uniformly effected by gradual progression, but frequently advanced in 'jumps' of a quarter to a half a mile in distance, and frequently added or took away from the lands to which they were joined sections of beach covering half a mile or less in extent as a result of a single storm. * * * Under these circumstances the trial court refused to find that the extension of Long Beach to the westward was made

by the process of accretion, and held as a question of law that the defendant's lessors, the town of Hempstead, did not acquire title to the land in dispute by that process, and we concur in the conclusion reached by it." The Court then quoted from a number of the standard authorities, definitions of the terms "gradual" and "imperceptible" as applicable to alluvion or accretion, and said: "It would seem from these definitions that two insuperable objections exist to the claim of appellant: * * * and secondly, that the mode of progress of Long Beach to the westward was frequently by sudden removals of the inlet, and the consequent junction of large and perceptible sections of beach to the easterly lands—as the result of a sudden and violent operation of the tides."

Thus upon principle, and as well upon authority, under the undisputed facts detailed in by the witnesses in this case, there has been no change in the boundaries of the Blumenthal lands since 1850. In other words, if the middle of the river, as it existed in 1814, and in 1818 upon the admission of Illinois, is the boundary, then there can be no sort of serious contention that the plaintiff does not, or that the defendant does own the lands in dispute. Because, if the line is a fixed line, it was fixed then, and fixed far to the northwest of the lands sued for. On the other hand, if the line be a shifting one, then, when Blumenthal purchased in 1850, it had gradually shifted still further to the northwest, and embraced within his boundaries still more of the soil in the bed of the river, and that line we maintain, in view of facts and the authorities above cited, has never shifted, but is the line to-day. But if, as contended

on the other side, the sudden action of the river during the freshets had the effect of legally changing this boundary, then the action of the United States, in the exercise of its lawful power, in building the dyke was equally efficacious and changed the boundary line back to its old place. At any rate, we shall show further on, this action of the government restored to Blumenthal, and those holding under him, the lands which had been submerged by the river from 1865 or 1866 until this work was done. But we maintain there was no change wrought in this boundary by the action of the river as detailed by the witnesses, since the time the lands were purchased by Blumenthal, but is now, and always has been, far to the northwest of the lands sued for.

It thus appearing the northwestern boundary line of these lands—the middle of the river—was and is to the northwest of the so-called island, and that the so-called island is now, in part at least, occupying the site of lands which, prior to the action of the river in sweeping away the lands, were dry lands, actually occupied and used by Blumenthal, or his tenants, it will be proper to discuss the effect of the submergence of this land and its reliction in the manner shown by the evidence.

We have seen the submergence here did not take place slowly and imperceptibly, but was the result of sudden action by the river during freshets, and we may, perhaps, concede the reliction (we will call it for want of a briefer term) was the result of the dyke constructed by the government in 1876 as shown by the evidence, but we maintain there was no change, and that Blumenthal did not lose the land when and while thus submerged, and when it reappeared above

the water it was his, although the reappearance was caused by the construction of the dyke by the United States.

In Hargrave's Law Tracts, pp. 15, 16, it is said by Lord Hale in his treatise *De Jure Maris*: "If the subject hath had by prescription the propriety of a certain tract, or creek, or navigable river, or arm of the sea," (or in this country by grant the soil of an unnavigable river,) "even while it is covered with water, by certain known metes or extents, this, though it should be relicted, the subject will have the property relicted. For he had it before, though covered with water; and although the sea is a fluid thing, yet the *terra solum* or *subjectum* is fixed; and by force of a clear and evident usage a subject may have" (and he has it in this country as we have seen) "the propriety of a private river; though the acquest of it be more difficult. * * * If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; *yet if by situation and extent of quantity, and bounding upon the firm land*, the same can be known, though the sea leave this land again, *or it be by art or industry regained*, the subject doth not lose his propriety; and accordingly it was held by Cooke and Foster, M. 7 Jac. C. B., though the inundation continue forty years. If the extent can reasonably be certain the case is clear.—Vide Dy. 326, 22 Ass. 93." * * *

The same author, in further illustration of this question, states the old case of *Shinbridge and Aure*, 18 Hen. 3 M. 21, and says: "The river Severn had gained upon Shinbridge so much, that its channel

ran over part of Shinbridge's lands, and left part thereof unto the other side, and then threw it back again to Shinbridge. It shall not belong to Aure. Neither was it at all claimed by the King, though Severn in that place be an open arm of the sea But it was restored to Shinbridge as before. * * * It is true, here were the bounds or marks continuing, viz: the Hedgewood. But suppose the inundation of the sea deface the marks and boundaries, *yet if the certain extent or contents from the land not overflowed can be evidenced, though the bounds be defaced, yet it shall be returned to the owner, according to those quantities and extents that it formerly had.* Only if any man be at the charge of inning of it, it seems by a decree of sewers he may hold it till he be reimbursed his charges. * * * But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where it was." * * *

In Angell on Tide Waters, p. 265, it is said: "This increase (by reliction) has been known in some parts of the world to occur suddenly and to a very great extent. In such cases the land left dry by the receding of the water is the property of the sovereign, as being a part and parcel of what previously was the sovereign *demesne*. The right of property in the soil, in other words, is not changed by such change of water. *The right of the riparian proprietors to their upland, which is inundated by an encroachment of the sea and then left dry is still retained.*"

In *Mulry vs. Norton*, 29 Hun. 664, when the case was before the Supreme Court, the Court said: "But we find nothing in the testimony which would

sustain us in holding that the plaintiff's grantors had lost title to the beach by reason of its overflow or submergence by the sea. The deeds to plaintiff's grantors bounded the land by the ocean. This carried the title to highwater mark. As late as 1858 it was all solid beach, and you could walk down to the old high-water mark. The submergence of the beach was subsequent to that date. The law of accretion applies between sovereign and subject the same as between subject and subject. When land is overflowed and the advance of the sea is so slow and gradual that its progress is imperceptible, the sovereign acquires title to the part of the shore submerged, but when the sea suddenly inundates the land the subject retains the title to the land covered with water. * * * The appellant cites Matter of Hull and Selby Railroad Co. (5 M. & W. 327) as holding a contrarry doctine. The head-note of that case is as follows: 'If the sea, or an arm of the sea, by gradual and imperceptible progress encroach upon the land of a subject, the land thereby covered with water belongs to the crown; but the Court distinctly recognizes the principle that when the inundation is sudden, there is no change in the title of the submerged land. Lord Abinger, after stating the principle contained in the head-note, says: "It is different, indeed, where the change occurs by a sudden advance or recession of the water. * * * This right to regain the land rests solely on the principle that the title to the submerged lands remains in the riparian owner. * * * Without entering into a discussion of the testimony we think it clear that the beach in front of plaintiff's property did not wear away by imperceptible degress. * *

Our conclusion is, therefore, that the State did not gain title to the plaintiff's lands by the overflow of the ocean. * * * As the land under water, therefore, belonged to the plaintiff's grantors they remained owners when it reappeared above the sea. 'If the soil when covered by water belonged to an individual, then, though relicted, it continues to belong to him.' (Angell on Tide Waters, 265.) "When the land, as it stood covered with water, did by particular usage or prescription belong to a subject, then the *recessus maris* as far as the subject's particular interest went while it was covered with water, so far the *recessus maris vel branchii ejusdem* belongs to the same subject." (Hale's De Jure Maris, 31.)

In the New York Court of Appeal in the above named case, 100 N. Y. 424, 53 Am. R. 206, the Court, by Ruger, C. J., said: "When portions of the mainland have been gradually encroached upon by the ocean so that navigable channels have been extended thereover, the people, by virtue of their sovereignty over public highways, undoubtedly succeed to the control of such channels and the ownership of the land under them *in case of its permanent acquisition by the sea*. It is equally true, however, that when the water disappears from the land, by its gradual retirement therefrom or the elevation of land by avulsion or accretion, *or even the exclusion of the water by artificial means*, its proprietorship returns to the original riparian owners. * * Neither does the lapse of time during which the submergence continues bar the right of such land owner to enter upon the land reclaimed, and assert his proprietorship."

It seems to us clear that the owners of this property did not lose their title thereto by reason of the changes described, and that the State has not acquired any property therein. The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in the tideways outside of the boundaries of property subject to individual ownership."

The case of *Morris vs. Brooke*, 53 American Rep. 215, fully illustrates this principle. It fully sustains the doctrine that where lands, an island in that case, have been submerged, and are afterwards restored or reclaimed, the owner of the land under the water owns the land as it appears above the water. See also Sedgwick & Wait on Trial of Title to Land, §§ 123, 124, where the same principle is announced. Thus we find an unbroken line of authorities supporting our proposition that there was no change of boundary or loss of title occasioned by the action of the river in destroying the shore lands, and that the submerged lands were rightfully and properly restored, even though it was effected by artificial means, either wholly or in part—by the building of the dyke by the United States.

Therefore, as the soil under the water where the land in dispute now stands belonged to the plaintiff's grantor, and, although they were submerged, they were never lost, and it is a matter of no importance to the plaitiff or the defendants, or any one else, whether the lands when restored formed from the shore towards the middle of the river, or began next the middle and formed towards the shore; being upon his soil they were his in either case, and by all the law applicable to this case, (*Deerfield vs. Ames*,

17 Pick. 41 S. C., 28 Am. Dec. 276 and notes), and we shall not discuss the question at length.

As a sequel to the foregoing, we will call attention to the condition of affairs in regard to the so-called island. It will be remembered this so-called island when it was originally surveyed was located on a particular site, about two miles further up the river. After 1863, by all the evidence, the so-called Arsenal or Quarantine Island commenced to wash away, and as a result of such washing the whole island has washed away and no part of it as originally surveyed is now in existence or above water, but the whole is entirely submerged or washed away and carried beyond the original surveyed limits.

Now we will concede that if by any means whatever the island, as surveyed, be restored on its original site, it will belong to the defendant, but until that shall occur, we maintain the defendants have no claim to any lands in the Mississippi river, and certainly not to the lands in dispute, as their island or otherwise, they being outside the boundaries of its lands, and within the boundaries of the lands of the plaintiff.

This necessarily results from the proper application of the principle involved in the cases and authorities quoted above.

Again, it will be remembered that when the alluvion, of which the so-called island is formed, was deposited and appeared above the water, it was upon the soil of the plaintiff's grantor, which was then under the water. The Mississippi river is an unnavigable stream, and the riparian owners upon its shores in Illinois take title to the soil under the water to the middle of the river, and they can not by any act of

any one, without their consent, nor by a recession of the river, be deprived of their right to the alluvion deposited upon their soil, or their rights as riparian owners to accretions formed on their front. When the waters of an unnavigable river recede from the shore, and form a new shore line, every one who is owner of lands fronting and bounding on the river is entitled to a front on the new shore line, and to his proper share of the relicted land, as well as to his boundary upon the thread of the stream, but in no case can this right be followed so as to entitle him to carry it laterally across the line of his coterminous neighbor.

In *Mulry vs. Norton*, 100 N. Y. 424, the Court said: "The sovereign succeeds to the ownership of such islands and formations only as are originally created and located in tide ways outside of the boundaries of property subject to individual ownership. We are also of the opinion that the principles applicable to the apportionment of lands formed by accretion among the owners of contiguous uplands is quite controlling as to the rights of the respective parties in this case. Such owners are entitled to lands made by accretion or reliction in front of their property and contiguous thereto in certain proportions according to the formation of their respective shore lines. However such accretions may be commenced or continued, the right of one owner of uplands to follow and appropriate them ceases when the formation passes laterally the line of his coterminous neighbor. * * * It would seem to follow from the principles referred to that the owner of Long Beach could not, even if the process of enlargement and extension was effected by accretion, claim

beyond the point where such accessions began to be made adjacent to the property of adjoining owners, and as the line of each successive owner of uplands was reached in the process of extension, a new obstacle to the appellant's claim would seem to arise. This result would occur undoubtedly after passing Hog Island inlet, as some of the land westerly thereof was originally solid beach, and occupied by the grantees of Hempstead beyond the extension of Long Beach."

In the case at bar we have seen the land in dispute occupies the site, at least in part, of what, in 1850 and for nearly twenty years afterwards, was solid upland and within the boundaries of the lands of Blumenthal, and in his actual possession, and the claim to this land by defendants is clearly violative of the principles of the case above cited and of the authorities there cited because those principles are as applicable to this case as to the case under consideration as the Courts and the text writers have frequently applied the same principles to cases arising upon our inland unnavigable rivers where the title of the riparian owner extends to the thread of the stream. *Deerfield vs. Arms*, 17 Pick 43 (S. C. 28 Am. Dec. 276.) *Knight vs. Wilder*, 2 Cush. 209. *Clark vs. Campau*, 19 Mich. 325. Gould on Waters, § § 162, 163. Angell on Watercourses, § § 55 56 and notes.

In *Clark vs. Campau* 19 Mich. 325, the Court said: "This right to land under water, extending from the shore toward the center or thread of the stream, has always been deemed as appurtenant to the shore itself. It has no reference whatever to the extent of the riparian owner's possessions back from the shore and is the same whether those possessions consist of a

deep parcel or a mere strip of shore. And this right to the covered lands in front has always been held to *exclude any adjacent claimant from intercepting in any way the full extent indicated by the width at the shore*, without reference to whether the tract approaches the shore at right angles or diagonally."

In *Bay City Gas Light Co. vs. Industrial Works*, 28 Mich. 182, the Court said: "In all cases of rivers and other running streams which serve as exterior boundaries, the common law, like the law of nations, recognizes the boundary as the middle of the stream, where there is no other intention manifested. Every proprietor whose rights are not terminated at the shore (as they were generally in tide waters) has a right extending to that central thread, *and no one on either side reaches beyond it.* Whatever his shore lines may be, his exterior line is in the middle of the stream. *Accordingly no other proprietor can lawfully interpose so as to cut him off from that line.*"

In view of these principles it is very clear that when the Arsenal Island washed away and the soil was carried beyond the boundaries of its lands that did not give defendant the right to the lands of the person upon which the defendant might imagine some of it had lodged. Again, under the law of the state of Illinois where the riparian owner takes to the thread of the stream, there can not be accretions to the foot of an Island, because that would be, in this case, to do just what the Courts in the cases above cited, have declared can not be done, for, as said by the New York Court of Appeals, the right of the owner of the Island to pursue the formation would, as soon as it passed the lateral lines of the riparian owners be upon their soil at the middle of the stream

or between that middle and the shore, and would encounter superior property rights of other persons the moment it reached the lateral lines of the riparian owners. And we respectfully maintain the result, accretions to the foot of the island, does not legally follow from the ownership of the bed of the river by the government. Such a holding might, in a case like this, cut off the riparian rights of every riparian owner on the Illinois shore for ten miles down the river, if this sand bar should extend down the river that distance, for it would still be an accretion to Arsenal Island if this land is.

The case of *Benson vs. Morrow*, 61 Mo., 353, holds that accretions may attach to the foot of an Island and deduces this conclusion from its other holding that the soil in the bed of the river belongs not to the riparian owners, but to the United States; a doctrine which is not held by any other court, and is certainly not held in Illinois, where the land in question here lies.

But this is not an accretion to Arsenal Island, neither is it Arsenal Island, nor can anyone assert that the land in question contains or is composed of any particle of soil or sand of which that Island was formed. But even if it were, when it was carried beyond the boundaries of that Island the defendant lost its right to it, and especially when it was by the action of the waters of the river deposited upon the plaintiff's soil and within his boundaries; the idea such a deposition of alluvion on the lands of the plaintiff deprived him of that land is hardly deserving of consideration, and the idea of an island floating down the river and absorbing the soil under the water of every riparian owner over which it passes

would certainly possess the merit of novelty as a legal proposition. At any rate such results are beyond possibility in view of the principles announced by the highest Court of all the States, and laid down by all standard text writers.

Having shown, as we certainly have, that Blumenthal acquired title to the soil under the waters of the river to the thread or middle of the stream by his deed, or by his deeds, as color title, his possession of the uplands and payment of taxes for more than seven successive years, which made his title by limitation to the accretions good (*Campbell vs. Laclede Gas Co.*, 84 Mo., 355.) that he never lost that title, and that the alluvion of which the lands sued for is composed was deposited upon that soil, it only remains to determine whether the plaintiff has acquired that title: and this depends upon the true construction of the deed of December 13, 1873, from Blumenthal to Rutz and others.

It is a rule of law that grants or deeds or to be construed according to the intention of the parties, which is to be ascertained from the language of the deed, considered in connection with the surrounding circumstances, but in seeking for this intention we must always keep in view another legal principle—that grants are to be construed most strongly against the grantor, which rule applies to matters of description and questions of boundary as well as to any other part of the deed. (*Middleton vs. Pritchard*, 3 Scam. 510. *Cottingham vs. Parr*, 93 Ill., 233.) It is also a rule of law, in this State and in nearly all of the other States, that grants bounded upon rivers, or their margins, above tide water, carry the exclusive right and title of the grantee to the soil under

the water to the thread of the stream, unless the terms of the grant expressly declare the intention to stop at the margin, or denote it so clearly by the terms of the grant as to leave no doubt, and in the consideration of this question these rules must be kept in view.

It appears, as we have already seen, that, at the time of the execution of the deed of December 23, 1873, from Blumenthal to Rutz and others, Blumenthal was the owner of the soil under the water to the middle of the river; that his boundaries embraced the site of the lands in dispute, and that part of these lands had then formed upon his soil. Under these circumstances he executed the deed above referred to, and by that deed he really conveys by two descriptions—first, by a general description he conveyed the northwestern part of these surveys, 149, 150, 151, 152, 153, 154, 155 and 156, with certain exceptions, containing 500 acres more or less. This description, which is good in itself, certainly conveyed the lands in dispute, because by a measurement these lands could be readily found, for *certum est quod certum reddi potest*, and this makes it a case for the application of the maxim, *falsa demonstratio non nocet*, for it is said in Brown's Legal Maxims, p. *562, that "As soon there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by the particular instrument, a subsequent erroneous addition will not vitiate it."

Therefore, when the grantor conveyed the northwestern part of these surveys, which extended to the middle of the river for their northwestern boundary, he evinced a general purpose, and a clear intention to embrace the lands to their entire extent to his north-

western boundary, and the particular matter of description, which was superadded even though it be thought to be at variance with the general discription must be rejected as a false demonstration or the deed must be construed, in accordance with the rule that it is to be taken most strongly against the grantor, so as to give effect to the general intention, because the most that can be said of the particular matter is, that it may render it doubtful whether it stops the boundary short of the middle of the stream or not, and in case there is doubt here, it must, as we have seen, be resolved against the grantor. *Richardson vs. Prentiss*, 48 Mich. 91. Angell on Watercourses, §23.

Again, there is another consideration which must settle the construction of this deed in favor of the plaintiff, and that is that the grantor after having, as we have seen, shown his general purpose and intention to convey to the northwestern boundary of his land, and after having used the particular matter of false demonstration, adds a clause which can have no other meaning or purpose than that the northwestern boundary of the grantor's lands was to be the northwestern boundary of the lands granted by the deed under consideration. This clause reads as follows: "Together with all rights as riparian owner to the accretion or sand bar lying northwestwardly, and between the extended lines, of said land herein described, situated in the County of St. Clair and State of Illinois."

We have seen that Blumenthal's boundaries embraced this "accretion or sand bar," and that his rights as riparian owner were those of absolute ownership of the river shore or bank and of the soil

under the water and above the water and within his boundaries. This then was a clear grant of Blumenthal's rights as a riparian owner, and of the soil under the water and upon which the accretion or sand bar was located, for these were his rights as riparian owner *par excellence*.

Besides, there is another thing in this connection which must not be overlooked, and that is the deed, in the third call of the particular description, ends the call, it is true, at low water mark, and then makes the fourth call as follows: thence down to the extended line between surveys 156 and 157, but down what it does not say, and we are left to doubt and conjecture on the print. In view of the rules we have already mentioned, and according to another rule, or a different statement of the same rule, it will never be presumed that a riparian grantor reserves anything to himself in front of riparian lands granted by him, but he must place the matter beyond doubt; and as he has not done so here we maintain the proper construction of the call last quoted is "down the river," and so the boundary is upon the river.

In order the better to illustrate these views we will quote from a few of the authorities referred to in the last paragraph of our brief.

In *Piper vs. Connelly*, 108 Ill., 646, the description was as particular as the particular part of the description here, so far as the deed went, and the Court said: "The general doctrine that grants of land bounded upon rivers or their margins, above tide-water, carry the exclusive right and title of the grantor to the center thread of the current, unless the terms of the grant clearly denote the intention to stop at the margin of the river, has been too long estab-

lished, and too firmly adhered to by this Court, to be now questioned. * * * The question of intention must be settled by the language of the deed and all the attendant circumstances in evidence, and not merely by the letter in the descriptive part of the deed. * * It does not really appear here, whether the contract or the deed was prior in execution, but the firm presumption is that the contract was, and that the deed was executed in discharge or satisfaction of the contract, but even in that view the contract may be referred to as a circumstance showing the intention of the parties as respects the sale—not of itself conclusive, but to be considered in connection with other circumstances. This contract, after the description of the property, had these words added: 'Together with all water privileges, rights and immunities of the said party of the first part therewith connected.' This, in connection with the fact that there is no pretense that there are any water privileges, rights, etc., connected with the tract, save those resulting from the river being the boundary on one side, renders it absolutely certain it was not then intended that *the defendant's rights should terminate at the water's edge.*'

How aptly this applies to this case, for, suppose we admit the particular description limited the grant to the water's edge, yet when we consider this additional grant of riparian rights, it, in the language of the court above quoted, renders it absolutely certain it was not intended the grantees' rights should stop at the water's edge, and when to this added grant we add the expressed intention of granting the northwestern part of the surveys, it is absolutely certain, a demonstration, that the grant extended to the utter-

most limit of the grantor's northwestern boundary.

In *Richardson vs. Prentiss*, 48 Mich. 88, the description in the deeed was: "so much of a reserved strip of land on Thunder bay shore as lies in the rear, and adjoining lot number five, in block number two, in Hitchcock's first addition to the village (now city) of Alpena, to extend no further into the bay than six rods from the rear line of said lot number five."

The court, after laying down the general doctrine, that grants bounded on our rivers above tide-water, go to the thread of the stream, said: "But when he (the owner) conveys with the water as a boundary, it will never be presumed that he reserves to himself proprietary rights in front of the land conveyed, which he may grant to other s for private occupation, or so occupy himself as to cut off his grantee from the privileges and conveniences which appertain to the shore of navigable water. * * The language in the deed, which has given rise to this controversy, is in my opinion, no stronger than though the land sought to be conveyed had been dsscribed by metes and bounds, running out six rods from the rear of lot five. The conveyance purports to be of lands; it is so much of a reserved strip as lies in the rear of lot five, but extending no further into the bay than six rods. The rights appurtenant to this land are not reserved, nor restricted in any way, and as the land conveyed extends out and into the waters of the bay, all riparian rights pertaining thereto pass with it as part of the subject matter. There cannot be found in the deed that clear, decided language of a manifest attempt to limit the grant, which the law requires in order to vary the rule so firmly established, under which ri-

parian rights follow a conveyance of the upland bank, or shore." In this case the defendant claimed title under a deed made subsequently to complainants from the complainant's grantor, of lands in the water and in front of the complainant's lands as above described, but the court enjoined him from improving them.

In *Kneeland vs. VanValkenburgh*, 46 Wisc. 434 (32 Am. R. 719), "it was held that the grantee of a lot bounded by a public street * * takes to the centre of the street, * * unless the street is expressly excluded from the grant" and in *Diederich vs. N. W. U. Ry. Co.*, 42 Wis., p. 261, it said "that a riparian owner upon a river or stream, navigable or unnavigable, take, in the absence of express limitation in title to the thread of the stream." The case of *Norcross vs. Griffiths*, 65 Wisc., 599, holds the same doctrine, and is a very instructive case.

In *Helmer vs. Castle*, 109 Ill., 635, which is a case of particular description, the court said: "A grant of land bordering on a highway or river carries the exclusive right and title in the highway or river to the center thereof, * * unless the terms of the grant clearly indicate an intention on the part of the grantor to confine the grantee to the edge or margin."

We shall not pursue this subject further, but will refer the court to the other cases cited to the last paragraph of our brief, which furnish many and varied applications of this rule, and say that by every rule applicable to this question the grantees in the deed of Dec. 23, 1873, took title to the soil under the water to the middle of the river, in other words, they took title to everything Blumenthal had within

his boundaries, and having so taken title the plaintiff's title to the lands in dispute is well made out.

We gave in evidence the confirmation of the surveys to the persons named in the State Papers, in order to show the title out of the United States, and produced our deeds, proved our claim and color of title, which the Courts presume was made in good faith, proved possession and payment of taxes under the color of title for more than seven successive years, and this is good title to those lands. (See cases cited to paragraphs fourteen and fifteen of our brief.) Besides, Blumenthal was in possession of these lands at the time of his conveyance, exercising acts of ownership over them, by leasing them and taking the rents and claiming to own them, and this is *prima facie* evidence of title in him, which by his deed he conveyed. His possession being under deeds, it was coextensive with the boundaries of his deeds.

In conclusion we will say, as we have already said, when Blumenthal purchased he took title to the soil under the waters of the Mississippi river to the middle of the stream, that that middle line, which was the northwestern boundary line of his lands, has not changed since 1850, as the action of the water in sweeping away the Illinois shore after 1863 did not change it; that the lands or sand bar or island in dispute were upon his soil and were his soil, to which he never lost title, until he conveyed it to plaintiff, and which were in large part actually occupied by him until after 1865 or 1866; that he did convey it to the plaintiff, who is now the owner in fee; that these lands being in Illinois it can not make any difference what rules of property Missouri may promulgate as

to lands within its confines, but this case must be determined by the laws of this State.

We, therefore, submit the cause, confidently believing that upon the facts of this case and under the law applicable to those facts, the judgment of the Circuit Court is right and should be affirmed.

Respectfully Submitted,

A. S. WILDERMAN,
of Counsel for Deft. in Error.